TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 15

STATE OF MISSOURI, AT THE RELATION OF SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

WALDO C. MAYFIELD, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI, AND HIS SUCCESSORS, AS PRESIDING JUDGE OF SAID COURT

No. 16

STATE OF MISSOURI EX REL. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

DAVID J. MURPHY, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI, AND HIS SUCCESSORS, AS PRESIDING JUDGE OF SAID COURT

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITIONS FOR CERTIORARI FILED FEBRUARY 11, 1950.

CERTIORARI GRANTED MARCH 27, 1950.

SUPREME COURT OF THE UNITED STATES

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Florida—Hagen v. Viney (1936), 169 So. 391, 124 Fla. 747;
[fol. 23] Pennsylvania—Overfield v. Pennroad Corp., 113 F. (d) 6 (C. C. A. Pa.);
Texas—Morris v. Mo. Pac. R. Co. (1890), 78 Tex. 17, 14 S. W. 228, 9 L. R. A. 349;
U. S.—Gulf Oil Co. v. Gilbert, 91 L. Ed. 1055, 330 U. S. 501;
and many English cases.

In 1928 and 1929 when the problem of overcrowded dockets in the courts of the State of New York was urgent and pressing, the state bar association appointed a committee to study the problem and, in connection with that problem, there appeared in 29 Columbia Law Review, page 1, an article by Mr. Paxton Blair concerning itself with this subject and stating as follows:

> "At the outset it is to be noted that new legislation is not needed before any benefit can be expected to flow from the remedies we propose; for the doctrine in question (forum non conveniens) involves nothing more than an appeal to the inherent power possessed by any court of justice—powers that is to say which are incontestably necessary to the effective performance of judicial functions."

It is submitted that our courts have the right and power to exercise their discretion in determining the applicability of the doctrine of forum non conveniens to actions brought in this state by non-residents against non-residents on claims arising in foreign jurisdictions under foreign law.

There remains only the treatment of the Minnesota decisions. Professor Roger S. Foster of the Yale University Law School has written two excellent articles on the place of trial, which articles appear in 43 Harvard Law Review, page 1217, and 44 Harvard Law Review, page 41. In the [fol. 24] latter article, Professor Foster treats among other

[fols. 1-2] [Caption omitted]

NOTICE OMITTED

[fol. 3] **IN THE SUPREME COURT OF MISSOURI**

STATE OF MISSOURI ex rel. SOUTHERN RAILWAY COMPANY, a Corporation, Relator,

vs.

THE HONORABLE WILLIAM L. MASON, Judge of the Circuit Court of the City of St. Louis, Missouri, and His Successors, as Presiding Judge of Said Court, Respondents

Original Proceeding in Mandamus

PETITION FOR WRIT, SUGGESTIONS AND EXHIBITS IN SUPPORT THEREOF

To the Honorable Judges of the Supreme Court of Missouri:

Comes now Southern Railway Company, a corporation, relator above named, and respectfully states and shows to the court:

1. That it is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Virginia and duly authorized to do business in the State of Missouri.

2. That respondent, William L. Mason, is a duly elected, qualified and commissioned judge of the Circuit Court of [fol. 4] the City of St. Louis, State of Missouri, and was on or about January 1, 1949, duly appointed, and was at all material times herein mentioned and is now, presiding judge in Division No. 1 of said Circuit Court, and said respondent, William L. Mason, made and entered of record the order hereinafter complained of, refusing to entertain jurisdiction and exercise discretion and rule on the merits of the issues presented by relator's motion to dismiss cause No. 23,161-D, pending in said court. And relator further represents that all motions in connection with pleadings in law cases, prior to trial, are heard and determined in Division No. 1 of said Circuit Court.

things the Minnesota decisions. His comment is, we think, a fitting close to these suggestions. At page 59 he states:

"The most interesting question suggested by the Douglas case is what will happen in the states which have thus far felt a constitutional compulsion to entertain vexatious suits by plaintiffs who are citizens of other states. Will they now feel free to treat questions as to the state of trial as sensibly as they do questions as to the county of trial, and will they regard citizens of sister states as no more entitled to abuse their processes than aliens and foreign corporations? This question was raised recently in Minnesota in the case of Boright v. Chicago, R. I. & Pac. R. R. The case was recognized as of great importance. Numerous counsel filed briefs as amici curiae—representatives of railroads and, on the plaintiff's side, counsel for labor unions and counsel whose interest is not stated of record. These last, one may infer, were interested as frequently appearing for non-resident plaintiffs in personal injury cases. The victory was for the personal injury racket—not, however, without a vigorous dissent. Thriving under a highly organized and thus far judicially tolerated system of ambulance chasing, and the old beliefs as to the effect of the privileges and immunities clause, the spectacle of vexatiously imported litigation has long been familiar in Minnesota. The majority opinion in the Boright case suggests that judges are perhaps becoming callous to it. It seemed that the common law power to adapt procedure to prevent its abuse had atrophied from disuse, and the court found on non-constitutional grounds that it was powerless to dismiss such suits. Instead of regretting this situation, it glorified the Minnesota law for its hospitality to strangers, thus indicating that it was still thinking in terms of a philosophy which assimilates [fol. 25] a would-be litigant to a laborer or business man entitled to a free opportunity to try his luck in whatever state he chooses. Compelled by the United States Supreme Court to abandon any constitutional sanction for this theory, the majority of the Court still stubbornly adheres to it as determining at least the domestic policy of the state. The decision is hardly one to commend itself for general acceptance."

3. Relator, Southern Railway Company, further states that on or about October 13, 1948, an action was filed in the Circuit Court of the City of St. Louis, State of Missouri, by Lelia M. Blevins, administratrix of the estate of Roderick E. Blevins, deceased, as plaintiff, against Southern Railway Company, a corporation, defendant (relator herein), said action being numbered 23,161-D; petition therein is attached hereto and marked Exhibit "A."

4. That summons in said cause was thereafter issued and served upon defendant on October 15, 1948.

5. That said cause of action arises out of an alleged accident occurring in the train yards of relator, said yards being known as "The Frisco Yard," being in the states of Virginia and Tennessee and located on the boundary between the said states, and plaintiff seeks damages in the amount of $100,000. Plaintiff and defendant in said cause are non-residents of the State of Missouri and jurisdiction is based on the Federal Employers' Liability Act.

6. Your relator further represents that on November 13, 1948, relator duly and promptly filed its motion to dismiss [fol. 5] said action, cause No. 23,161-D, in the Circuit Court of the City of St. Louis, State of Missouri, on the ground of forum non conveniens. Said motion is attached hereto and marked Exhibit "B."

7. That thereafter on the 11th day of February, 1949, said motion was presented, argued and submitted in Division No. 1 of the said Circuit Court and to respondent, William L. Mason, judge thereof, duly qualified as aforesaid.

8. That memoranda of the plaintiff and defendant (relator) in said cause were presented to respondent and on the 14th day of March, 1949, respondent entered his order ruling on said motion, in words and figures as follows:

> "Defendant's motion to dismiss upon the ground of forum non conveniens denied upon the sole ground that in the opinion of the Court, the Court has no jurisdiction or discretion to entertain or grant such a motion. Court's memo filed.
>
> William L. Mason, Judge."

A copy of said order is attached hereto and marked Exhibit "C".

9. Relator further states that respondent has by his order of March 14, 1949, refused to rule upon the merits of relator's motion duly filed in said cause No. 23161-D in the Circuit Court of the City of St. Louis, State of Missouri, and refused to exercise his proper discretion and jurisdiction and that unless the said respondent is ordered and compelled to set aside and vacate respondent's said order dated March 14, 1949, and to exercise his said discretion and jurisdiction in said cause No. 23161-D, relator will be compelled to engage in long, expensive, burdensome and vexatious litigation and has no other adequate remedy.

[fol. 6] 10. Relator further states that there are now pending in said Circuit Court numerous actions involving similar circumstances, and others are continually being filed, and the refusal of respondent to exercise his proper jurisdiction presents questions of extraordinary importance and interest.

11. Relator further states that it is without an adequate remedy in the premises unless this Honorable Court will interfere and grant it a writ of mandamus as hereinafter prayed.

Wherefore, relator prays that this Honorable Court issue its alternative writ of mandamus commanding that respondent set aside his said order of March 14, 1949, in cause No. 23161-D and to exercise his proper jurisdiction and to determine on the merits the issues presented by relator's said motion to dismiss heretofore filed in said cause No. 23161-D aforesaid; or failing that, that respondent show cause why he should not so vacate said order and proceed to exercise his proper jurisdiction and discretion in the premises and that upon a hearing hereof the direction of said alternative writ be made permanent and that the proceedings in said cause No. 23161-D now pending in the Circuit Court of the City of St. Louis be stayed until such hearing and for such other and further relief as may to this Honorable Court seem meet and proper in the premises.

Southern Railway Company, Kramer, Campbell, Costello & Wiechert, Fordyce, White, Mayne, Williams & Hartman, Thomas Rowe Schwarz and F. W. Schwarz, Attorneys for Relator.

[fol. 7] *Duly sworn to by F. W. Schwarz. Jurat omitted in printing.*

[fol. 8] Suggestions in Support of Petition for Writ of Mandamus

I

Statement of Facts

The facts of this matter briefly stated are that in the month of October, 1948, plaintiff, a resident of the State of Tennessee, brought an action under the Federal Employers' Liability Act in the Circuit Court of St. Louis in which she joined as defendant the Southern Railway Company, your relator herein, said company being a corporation organized and existing under the laws of the State of Virginia and having no track, operating no trains, and doing no intrastate business in the State of Missouri. Thereafter, in due time, your relator, defendant in said action, filed its motion to dismiss the cause on the ground of forum non conveniens. The motion was presented to respondent as presiding Judge of Division No. 1 of the Circuit Court of the City of St. Louis, in which division all pretrial motions in law cases are heard. The motion was taken under submission by respondent, briefs of the parties were filed and thereafter on March 14, 1949, respondent entered the order complained of, in which said order he determined that he had no jurisdiction or discretion to entertain said motion. In connection with this order, respondent filed his memorandum, copy of which is attached hereto and marked Exhibit "D", in which respondent purportedly relies on the decision of this court in the case of Bright v. Wheelock, 20 S. W. (2d) 684, and the interpretation allegedly given therein to Sections 1163 and 1180 of the Missouri Revised Statutes. 1919. As hereinafter pointed out, the Bright case, supra, is not authority for this holding and the statutes referred to have not [fol. 9] been construed with respect to this point and therefore it is submitted that said ruling of respondent is erroneous and inconsistent with the law of Missouri.

and defendant were engaged in interstate commerce and in interstate transportation by railroad at the time of the occurrences herein pleaded.

IV

That at all times herein mentioned, the defendant was engaging in the business of commerce, in, through and between the several states and territories of the United States as a common carrier by steam railroad, and for a long time prior to the date plaintiff's intestate suffered and sustained the injuries causing his death, all or part of the plaintiff's intestate's duties were in the furtherance of defendant's business of interstate commerce and interstate transportation.

V

Plaintiff further alleges that the defendant owned, maintained and operated, as part of its line and system of railroad, its certain railroad tracks extending through Tennessee and Virginia, and in and near the said City of Frisco, Tennessee, it managed, controlled and operated its certain railroad yard consisting of divers railroad tracks and appurtenances, known as the Frisco Yard located partly [fol. 29] in the States of Tennessee and Virginia, over which it operated its trains in the furtherance of its interstate commerce business.

VI

That on the 25th day of November, 1946, plaintiff's intestate was working as a conductor on a certain train of the defendant, #65, consisting of an engine and 34 cars then and there being moved, hauled and used in interstate commerce and interstate transportation, and plaintiff's intestate and defendant were then and there engaged in interstate commerce and interstate transportation by railroad.

VII

That at the time of the occurrence complained of it was the duty of the plaintiff's intestate and the crew members of train #65 to set off a certain nine cars from said train #65 and locate them on a certain yard track in the Frisco Yard, Virginia; that in order to effect their purpose as aforesaid, it was necessary for said train #65 to pull across a certain trestle in said yard so that the main line switch could be cleared and lined up to permit the entrance

II

This Court Has Jurisdiction to Entertain Petitions for Extraordinary Remedial Writs and to Exercise Superintending Control over the Inferior Courts and Tribunals of This State and Should in This Matter, Because of Its Importance and General Interest, Exercise Said Jurisdiction

The Supreme Court of Missouri has original jurisdiction to entertain petitions for extraordinary remedial writs and to exercise superintending control over the inferior courts and tribunals in its jurisdiction, Missouri Constitution, 1945, Article V, Section 4, and this power has long been granted to the Supreme Court of Missouri. See Missouri Constitution, 1875, Article VI, Section 3, and 1884 Amendments, Article VI, Sections 8 and 12. This court has consistently held that the existence of concurrent jurisdiction to issue such remedial writs is in no wise a limitation upon the jurisdiction of this court to entertain such original petitions and to issue such remedial writs, and has further held that the practice of the Supreme Court in declining to issue such writs unless the case is one of more than ordinary importance is a rule of expediency and does not affect the jurisdiction of the court. State ex rel. v. Tracy, 94 Mo. 217; State ex rel. v. Dearing (Banc), 173 Mo. 492, l. c. 510; State ex rel. v. Grimm (Banc), 220 Mo. 483.

[fol. 10]

III

The Question of Law Presented by Respondent's Refusal to Entertain Jurisdiction Is of Great Importance to the Profession, the Public and the Courts and This Court Should Therefore Exercise Its Powers

The question of law involved in respondent's assertion that he is without jurisdiction to exercise his judicial discretion in ruling upon petitioner's said motion and that he is without jurisdiction to entertain the same is one of general interest and importance not only to the profession but to the courts, the public and the taxpayers as well as it affects the administration of the circuit courts. During recent years, many of these Federal Liability cases have been filed in the Circuit Court of the City of St. Louis, in which the plaintiffs and defendants are non-residents and

of the said nine cars into the yard track as aforesaid; that it was necessary, after said nine cars were set off, for said train #65 to proceed eastwardly so that the main line switch, as aforesaid, could be cleared to allow the switch to be thrown so that said train could re-cross said trestle, couple onto its caboose and proceed on its journey in interstate commerce; that at the time the rear end car of said train #65 had cleared the main line switch as aforesaid, the view to the rear from the locomotive and the leading cars on the front end of said train #65 was obscured by the curvature of the tracks and high banks then and there existing on either side of said yard at that point.

[fol. 30]

VIII

That plaintiff's intestate, as was his duty, had proceeded across the trestle as aforesaid with said train in order that the work of the defendant as aforesaid could be properly supervised and accomplished, and that as the engine of said train #65 reversed and proceeded to push said train #65 across said trestle to couple onto the caboose, the plaintiff's intestate attempted to remount said train #65 or a car of said train, located, to-wit: seven cars from the rear of said train, but the plaintiff's intestate's foot was caused to and did slip from the ladder of said car, causing him to be dangled and be dragged onto said trestle; that despite the frantic signals of the brakeman said train #65 failed to stop, causing the plaintiff's intestate to drop, fall and be thrown from the trestle a distance of, to-wit: forty (40) feet to the ground below causing him to sustain injuries from which he subsequently died.

IX

That at the time and place aforesaid, the defendant was guilty of one or more of the following acts of negligence:

(a) That it became and was the duty of the defendant to exercise ordinary care to provide the plaintiff's intestate with a reasonably safe place to work; but the defendant, notwithstanding its duty in this regard, failed to exercise ordinary care to provide plaintiff's intestate with a reasonably safe place to work and as a proximate result of the defendant's failure as aforesaid, the plaintiff's intestate sustained injuries from which he subsequently died.

in which the causes of action accrued in other states hundreds of families from St. Louis where the plaintiffs and all the witnesses reside. Many of such cases are now pending in said court and the number being filed is constantly increasing.* Not only are the particular litigants themselves put to great expense and inconvenience by the selection of such a forum, but the crowding of the trial docket with these cases materially affects the prompt trial of litigation between residents and the ability of the court to administer justice.** Due to the length of time this type of case usually requires in trial, the assessed costs therein are not sufficient to meet the actual expenses and, as a consequence, Missouri taxpayers must pay the dif- [fol. 11] ference resulting from this non-resident litigation, to say nothing about the general overhead expenses chargeable to such litigation.

IV

Mandamus Is the Proper and Appropriate Remedy to Compel Judges of Inferior Courts to Hear and Determine All Issues Properly Presented

Under the Constitutional provision, Missouri Constitution, 1945, Article V, Section 4 (and its corresponding provisions in the Missouri Constitution, 1875, as amended), providing for superintending control of inferior courts, it has been consistently held that mandamus is the proper and appropriate remedy to compel judges of inferior courts to hear and determine all issues properly presented, and it is the duty of this court to require judges of such inferior courts to exercise their full and whole jurisdiction. State ex rel. v. Brown, 330 Mo. 222, 48 S. W. (2d) 857, l. c.

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* One of the factors which will cause increased litigation of this type in the Circuit Court of the City of St. Louis is the amendment to the U. S. Judicial Code (Sec. 1404a), effective since September, which permits the Federal District Courts to transfer such cases to a more convenient district, and the recent sustaining by the Circuit Court of Cook County (Chicago) Illinois, of a motion to dismiss on the ground of forum non conveniens in a Federal Employers' Liability case.

** See Judge Francis Williams' suggestion in respect of criminal divisions.

859; State ex rel. v. Haid (Banc), 327 Mo. 567, l. c. 573-4; State ex rel. v. Trimble (Banc), 303 Mo. 284, l. c. 291; State ex rel. v. Ellison (Banc), 277 Mo. 46, l. c. 54. The fact that such inferior court has erroneously concluded that it is without jurisdiction is of no consequence and the superintending court will determine for itself from the record of the inferior court whether or not jurisdiction exists. State ex rel. — Trimble (Banc), 308 Mo. 278, l. c. 286-8; State ex rel. v. Trimble (Banc), 303 Mo. 284, l. c. 291; State ex rel. v. Ellison (Banc), 277 Mo. 46, l. c. 55.

V

Relator Has no Other Adequate Remedy

By reason of the nature of the ground of relator's motion to dismiss, relator has no other adequate remedy be- [fol. 12] cause the trial will ensue and the prospective injury to relator, the court, the taxpayers and the administration of justice will have become an accomplished fact.

VI

Respondent Possesses Jurisdiction to Rule on the Merits of Relator's Motion to Dismiss Cause No. 23161-D

A. A state court having concurrent jurisdiction with other state and federal courts of an action arising under an act of Congress may determine for itself whether its duty requires it to assume jurisdiction in an action between non-residents. Douglas v. New York and New Hampshire R. R. Co., 279 U. S. 377. The privilege of a non-resident to sue another non-resident on a cause of action arising in some other state in the courts of the State of Missouri at common law rested purely on the doctrine of comity, and the courts of this state were free and did in the exercise of discretion inherently vested in them decline to assume such jurisdiction or try such cases where sufficient reason appeared. Newlin v. The Railway Co., 222 Mo. 375, l. c. 391; State ex rel. v. Grimm, 239 Mo. 135, l. c. 180.

B. Missouri Revised Statutes Annotated, Sections 856 and 857 (former enactments—Missouri Revised Statutes, 1929, Sections 705-6; Missouri Revised Statutes, 1919, Sections 1162-3; Missouri Revised Statutes, 1909, Sections 1736 and 1737; Missouri Revised Statutes, 1899, Sections

547-8 [Section 548, Amended Laws for 1905, page 95]), opening the doors of our courts to non-residents for causes of action accruing in sister states are legislative declarations of the doctrine of comity, and comity in the legal sense is the granting of a privilege not a right in reason has its useful limitations. Newlin v. The Railway Co., [fol .13] 222 Mo. 375, l. c. 391: McGinnis v. Missouri Car & Foundry Co., 174 Mo. 225, l. c. 235. It is important at this juncture to point out that the amendment of 1905 relating to the recognition of the capacity of foreign administrators is the only portion of these statutes that is not a mere declaration of a pre-existing common-law doctrine. The importance of this distinction in the legislative history of the various portions of these statutes will appear later. The courts of Missouri and courts generally have held that comity, whether enforced by legislative declaration or not, has its useful limitations in reason and does not confer an inflexible right. Some such limitations are the inability of a local forum to do complete justice; the application of sound discretion as to convenience; the considerations of public policy; the enticement of jurisdiction from other states; the burdening of the functions of the essential capacity of the court with regard to the jurisdiction in which it exists, and others. See Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 91 L. Ed. 1055, l. c. 1062-1063; State ex rel. v. State Board of Health, 61 S. W. (2d) 925, l. c. 927; Newlin v. The Railway Co., 222 Mo. 375; Ex parte Gounis, 304 Mo. 428, l. c. 442-3 Douglas v. New York & New Hampshire R. R. Co., 279 U. S. 377, and 15 C. J. S.—Courts—Section 118.

The application of this limiting doctrine, whether enforced by statutory enactment or merely in the exercise of the inherent power of the court is not repugnant to any provisions in the Federal Constitution. Douglas v. New York & New Hampshire R. R. Co., 279 U. S. 377. In this case there are valid substantial grounds on which the trial court in its discretion could have refused to retain jurisdiction. See Exhibit "B" attached to the petition.

C. Respondent erroneously ruled that he had no jurisdiction or discretion to entertain or rule upon the merits of [fol. 14] relator's motion to dismiss and in making said ruling erroneously relied upon certain language found in the case of Bright v. Wheelock, 20 S. W. (2d) 684, purporting to construe Section 1163 and 1180, Missouri Revised Stat-

XIII

That by reason of the facts alleged herein, plaintiff is entitled to recover damages on account of the conscious pain and suffering endured by plaintiff's intestate between the time of his injury and the time of his death, and also damages on account of the pecuniary loss suffered and sustained by the beneficiary and heir at law of the said intestate, in the sum of $100,000.00.

Wherefore, plaintiff prays judgment against the said defendant in the sum of $100,000.00 together with the costs and disbursements of this action.

Jerome Duggan, Wainwright Building, St. Louis, Missouri; Jos. B. McGlynn, 800 Spivey Building, East St. Louis, Illinois, Attorneys for Plaintiff.

Jury trial demanded by plaintiff.

[fol. 34] EXHIBIT B

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI

No. 23161-D. Division No. 1

LELIA M. BLEVINS, Administratrix of the Estate of Roderick E. Blevins, Deceased, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

MOTION TO DISMISS ON THE GROUND OF NON CONVENIENS

Now comes Southern Railway Company, defendant in the above-entitled cause, by its attorneys, and appearing specially in this cause for the sole purpose of making this motion, and for no other purpose, and moves the Court under the doctrine of "forum non conveniens" to dismiss, without prejudice, the above-entitled cause as vexatious, oppressive and an abuse of the process of this Court, and in support of this motion says:

1. That this is an action at law to recover alleged damages on account of the death of Roderick E. Blevins, and

utes, 1919, prior and subsequent enactments of which have been set out heretofore. The court stated under this authority that retention of jurisdiction was mandatory. The case of Bright v. Wheelock, supra, does not construe the statutes mentioned therein but simply refers to the cases of Wells v. Davis, 261 S. W. 58; State ex rel. Foraker v. Hoffman, 274 S. W. 362 and Shaw v. The Chicago & Alton R. R. Co., 314 Mo. 123, 282 S. W. 416. One other case, that of State ex rel. v. Grimm, 239 Mo. 135, requires discussion and for convenience they will be discussed in their chronological order.

The Grimm case, supra, decided that the statute providing for service on insurance companies which enabled the plaintiff administratrix of the estate of the deceased insured in that case to serve a foreign insurance company through the Insurance Commissioner at Jefferson City even though the policy was not written in this state was directly overruled on that point in the case of State ex rel. v. Landwehr, 318 Mo. 181. The Grimm case came before the court on prohibition but nevertheless the court in a purely obiter statement, which concerned solely a matter of judicial discretion on the part of the trial court and not a question of jurisdiction, misstates the effect of the Newlin case as to the mandatory nature of Section 547, Missouri Revised Statutes, 1899, and Section 548, as amended, 1905 Laws, page 95. The Newlin case clearly holds that these statutes are legislative declarations of the doctrine of comity and subject to limitations in the use of discretion. The Grimm case states that the Newlin case holds them to be mandatory. To reenforce its position in the obiter statement made in the Grimm case, the court [fol. 15] alludes to the requirements of the Federal Constitution, Article IV, Section 2, and the 14th Amendment to said Constitution, Section 1. That this interpretation of the Federal Constitution is without warrant will be seen by referring to the decision of the United States Supreme Court, the final arbiter of the question, in the case of Douglas v. New York & New Hampshire R. R. Co., 279 U. S. 377, which case is cited with approval in the recent case of Gulf Oil Co. v. Gilbert, 91 L. Ed. 1055, l. c. 1062. The misstatement of the effect and holding of the Newlin case is immediately apparent upon a comparison of the two cases and, of course, in any event the statement in the Grimm case is pure obiter.

this action is brought by Lelia M. Blevins, allegedly Administratrix of the Estate of Roderick E. Blevins, deceased, under an appointment of the County Court of Sullivan County, Tennessee. The action is allegedly brought under the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-60.

2. That the occurrence out of which this action allegedly grows arose in the Frisco Yard of the Southern Railway [fol. 35] Company, which Yard is located partly in the State of Tennessee and partly in the State of Virginia.

3. That at the time of the accident plaintiff resided in or about the City of Bristol, Tennessee, and as far as is known now so resides. The City of Bristol, Tennessee, is 690.7 miles from St. Louis, Missouri. The City of Appalachia, Virginia, is 760.7 miles from St. Louis, Missouri. In both the aforementioned Cities of Appalachia, Virginia, and Bristol, Tennessee, there are courts of general jurisdiction which do and would have jurisdiction of this cause, and both said courts are located within 100 miles of the place of residence of the plaintiff.

4. That at the trial of this cause, in order properly to present its defense, defendant, Southern Railway Company, will necessarily require the attendance and testimony of witnesses employed by it, including one trainmaster, one yardmaster, one engineer, one fireman, one flagman, one brakeman and two B & B men, and each of these witnesses resides either in Appalachia, Virginia, or Bristol, Tennessee. In addition to the foregoing witnesses the attendance of Dr. W. H. Reed, of Kingsport, Tennessee, will be required. It is estimated that in addition to the plaintiff, the plaintiff will require three witnesses. While the defendant believes that these employee-witnesses will be willing to come to St. Louis, Missouri, to testify in this case if the same is tried here, yet the cost of obtaining their attendance in this Court would greatly exceed the cost of obtaining their attendance at a trial of this case either in the Circuit Court in the State of Virginia, sitting in Appalachia, Virginia, or in the Circuit Court of the State of Tennessee, sitting in Bristol, Tennessee. Defendant is of the opinion that the extra cost of securing the attendance at St. Louis, Missouri, of such employee-witnesses would exceed the sum of $1,280.00, and that in addi-

The case of Wells v. Davis, supra, decided the point that a Missouri court must recognize the capacity of an Arkansas administratrix to sue in our courts. The question as to the convenience of the place of trial was not raised and, as a matter of fact, the defendant was a Missouri corporation, and the only error complained of was lack of capacity in the plaintiff to sue.

The case of State ex rel. Foraker v. Hoffman, 274 S. W. 362, decided that Section 1180 of the Missouri Revised Statutes, 1919, pertaining to service on a railroad company, was not unconstitutional as an undue burden on interstate commerce. Again the question of place of trial is not raised and again the defendant is a Missouri corporation. In that case, Section 1163 is not mentioned.

In the case of Shaw v. The Chicago & Alton R. R. Co., 314 Mo. 123, 282 S. W. 416, the defendant moved to dismiss the action in the trial court, but the motion is not set out in full. On appeal, the respondent set out as its assignment of error and Point 1, l. c. 125:

> "Respondent as administratrix, appointed under the laws of the State of Illinois, has no right or authority [fol. 16] to maintain this suit in Missouri and the trial court erred in not sustaining the motion to dismiss," citing cases.

The court quite properly rules that the inconvenience occasioned does not distinguish this case from the Wells case insofar as the plaintiff's capacity to sue goes and refers specifically to Section 1163 of the Missouri Revised Statutes, 1919, as determining the matter of capacity and states that the motion was properly overruled. In that case, there was no appellate question of the discretion of the trial court to rule on the ground of forum non conveniens as such point was not assigned as error. The appellate issue which was decided was limited to the holding that a foreign administratrix had legal capacity to sue in this state. From this discussion of the Wells, Foraker and Shaw cases, on which the language in the Bright case is based, it is readily apparent that they are not support for that language.

In the Bright case, plaintiff appealed from an order of the trial court in granting a new trial. The trial court based its order for new trial on the following grounds:

> "(1) In giving instruction No. 5 for plaintiff;

tion to this expense on the defendant's part, a similar addi-
[fol. 36] tional expense to the plaintiff in an estimated amount of $200.00 will accrue.

5. That the trial of this cause will consume approximately four days. The testimony of Dr. W. H. Reed, of Kingsport, Tennessee, will be required, and if the Doctor is willing to come to St. Louis his practice will be interrupted, as a result of this action being tried here, for a period of six days, whereas, were this cause tried either at Appalachia, Virginia, or at Bristol, Tennessee, or in the Federal Courts sitting in those areas, no more than one day loss of time by the Doctor would accrue.

6. That in addition defendant expects to have two, or possibly three, witnesses well acquainted with the site of the accident at approximately the same time of the year the accident happened, to determine the physical nature of the scene of the accident. Such witnesses will reside in or near the City of Frisco, Tennessee, and within 100 miles of Bristol, Tennessee, or Appalachia, Virginia.

7. As far as defendant is advised, all of plaintiff's possible witnesses upon the trial of this cause reside in the States of Tennessee or Virginia and within 75 miles of the City of Frisco, Tennessee.

8. It is possible, and in fact probable, that upon the trial of this cause it might become proper and material for the jury to view the premises, namely, the trestle mentioned in plaintiff's petition. Such view could not possibly be made by the jury if this cause were tried in this Court.

9. That there is ample time remaining for plaintiff to bring this action in the States of Virginia or Tennessee, or in the Federal Courts sitting in the area surrounding the City of Frisco, Tennessee, on account of her alleged cause of action; and if this motion is allowed and this cause dismissed, without prejudice, plaintiff will not be deprived [fol. 37] of her rights or barred to maintain her suit in the aforementioned jurisdictions.

10. Wherefore, on account of the matters and things hereinabove alleged and set forth, this defendant says that to try this case in the Circuit Court of the City of St. Louis, Missouri, would be vexatious, oppressive and an abuse of the process of this Court; and that under the

"(2) In refusing No. 12 for defendant;

"(3) Because of prejudicial error in opening statement of plaintiff's counsel and also improper cross-examination of said witness Utt in reference to said pictures;

and defendant's motion in arrest of judgment is overruled and defendants except thereto."

The court, after reviewing the record and the pertinent facts in the transcript, rules:

(1) That the cross-examination of Utt in reference to the pictures was error and that the determination of the [fol. 17] trial court that this error was prejudicial will not be disturbed, and disposes of the appeal on that basis. Having thus disposed of the case, the court then states:

"Since this cause must be remanded for a retrial for the reasons stated in paragraph I of this opinion, it may be well for us to discuss, somewhat briefly, the two other grounds, or reasons, upon which the trial court predicated the order granting a new trial. One of such grounds was that the court erred in giving, at the request of plaintiff, instruction No. 5,"

and properly states that the giving of instruction No. 5 was not error in that the matter there set out did not constitute a defense. Instruction No. 5 seemingly recited:

"The court instructs the jury that if you find that the defendants at the time and place in question were engaged in commerce between states as defined in instruction No. 1, then the plaintiff had the right to bring and prosecute this suit in this county and state and the fact that the Chicago & Alton Railroad Company is incorporated in Illinois, or that the plaintiff and defendants are residents of that state, or that the injury occurred there, or that plaintiff might have sued in the courts of that state, does not constitute a defense to this cause of action."

The court then states another ground, 20 S. W. (2d) 700:

"Another ground upon which the trial court predicated the order granting a new trial is that the court

doctrine of "forum non conveniens," this action ought to be by this Court dismissed, without prejudice, so that plaintiff, if she so desires, may prosecute her alleged cause of action either in the Circuit Court of the State of Tennessee, sitting at Bristol, Tennessee, or in the Circuit Court of the State of Virginia, sitting at Appalachia, Virginia, or in the United States District Court located in that area.

Summarizing the reasons therefor and the rules of law applicable thereto, in view of the foregoing facts, defendant says:

(a) The relative ease and availability of access to the plaintiff in either the courts of Virginia or Tennessee or the Federal Court as compared to this Court.

(b) The availability of process to secure the personal attendance of witnesses upon the trial and the avoidance of taking depositions.

(c) The relative cost of obtaining attendance of willing witnesses and the difficulty, and perhaps inability, of obtaining the attendance of unwilling witnesses residing in other States.

(d) The possibility of a view of the premises.

(e) The administrative difficulties arising by the piling up of litigation in congested areas, of which the Court will take judicial notice.

(f) Avoidance of problems of conflict of laws.

[fol. 38] (g) The other practical problems as indicated in the facts set forth, so as to make the trial of this cause as easily expeditious and inexpensive as possible.

All of which is respectfully submitted and prayed.

Southern Railway Company, by Kramer, Campbell, Costello & Wiechert, Bruce A. Campbell, 606-618 First National Bank Building, East St. Louis, Illinois, By Fordyce, White, Mayne, Williams & Hartman, F. W. Schwarz, 506 Olive Street, St. Louis, Missouri, Attorneys for Defendant.

> erred in refusing to give instruction No. 12, requested by defendants. The instruction reads: 'The court instructs the jury that if they believe from the evidence plaintiff, Bright, stepped from the step of the pilot of the engine upon the ground, the court further instructs you that it was the duty of brakeman Bright to watch out where he was stepping and be careful in [fol. 18] stepping off the step, and the court further instructs you that if they believe from the evidence plaintiff was negligent in stepping off the step onto the ground, and by reason thereof fell and was struck by the cars, then your verdict must be in favor of the defendants,' "

and holds that the refusal of instruction No. 12 was not error. After making these determinations, the court states:

> "Respondents urge that the order granting a new trial is sustainable upon other grounds, assigned in defendants' motion for new trial, but not specified by the trial court in the order granting a new trial. It is unnecessary to discuss such matters, inasmuch as the order granting a new trial must be affirmed upon the ground, and for the reasons, stated in paragraph I hereof."

This case did not pretend to decide the question of discretion of the trial court to retain or refuse the jurisdiction on the ground of forum non conveniens and statements regarding that matter are clearly obiter dictum. But even were this not so, the court did not make any effort to construe sections 1163 and 1180 of the Missouri Revised Statutes 1919 (present enactments, Missouri Revised Statutes Annotated, Sections 856-7), but after recognizing that there was no constitutional basis to require that assumption, in view of the Douglas case, supra, and that New York had construed similar sections of their statutes to invest a court with such discretion, simply states:

> "Our previous rulings announced in the Shaw, Wells and Foraker cases appear to be to the effect that the statutes, supra (1163 and 1180), do not invest the courts of our state with such discretion and we see no good or sufficient reason for overruling at this time our prior decisions construing such statutes."

[fol. 19] Section 1180 was not in this case and, in any event, the court recognizes that it was not ruling on or construing these statutes and that there was no occasion or reason to do so. The court also seems to realize that the removal by the United States Supreme Court decision in the Douglas case, supra, of the Constitutional basis for language postulating mandatory retention of jurisdiction under these statutes (language which was originated in the Grimm case) left the answer to this serious question in a state of doubt. This doubt has not since been resolved by this court. From the discussion heretofore had of the Wells, Shaw and Foraker cases, it is clear that there has been no such interpretation of these statutes in those cases. The fundamental cases of McGinnis v. Missouri Car & Foundry Co., 174 Mo. 225, l. c. 235, and Newlin v. The Railway Co., 220 Mo. 375, l. c. 291, clearly hold that these statutes (except the 1905 amendment) are legislative declarations of comity and subject to the discretionary limits of that doctrine.

VII

Under the Normal Well Recognized and Proper Rules of Statutory Construction, Missouri Revised Statutes Annotated, Sections 856-7, Opening the Doors of This State to Causes of Action Arising in Other Jurisdictions Should Be Construed to Vest the Trial Court With Discretion on the Question of Retaining and Exercising Its Jurisdiction

The legislative history of Sections 856-7, insofar as it is material, is set out in the table below:

Missouri Revised Statutes Ann., Secs. 856-7;
Missouri Revised Statutes, 1929, Secs. 705-6;
Missouri Revised Statutes, 1919, Secs. 1162-3;
Missouri Revised Statutes, 1909, Secs. 1736-7;
[fol. 20] Amendment to Sec. 548, Mo. R. S., 1899, by Laws 1905, page 95;
Missouri Revised Statutes, 1899, Secs. 547-8;
Original Enactment Laws, 1891, page 68.

It will be noted that the only change in these sections throughout their history is the amendment of 1905, and it was through that amendment that Missouri courts were compelled to recognize the capacity of foreign adminis-

trators, guardians, etc., in order to fill the hiatus left by the decision in McGinnis v. Missouri Car & Foundry Co., 174 Mo. 225. The remaining provisions of these two sections are mere legislative declarations of the doctrine of comity as was the original Section 547, Missouri Revised Statutes, 1899, and the portion of Section 548, exclusive of the capacity provision. It has been so held in the case of Newlin v. The Railway Co. and McGinnis v. Missouri Car & Foundry Co., supra.

This statute, Section 548, Missouri Revised Statutes, 1899, was amended as the result of the McGinnis case, supra. In that case a party appointed by a circuit court in accordance with the then existing section, sought to enforce a death action occurring in the State of Illinois, and the court held that inasmuch as the statute conferring an action for wrongful death designated the party to enforce the right, the Missouri Legislature was without power to make a different designation and held that insofar as the statute attempted that it was void. The court then recommended the amendment of the statute which was subsequently made in 1905 and used the following language, 174 Mo. 225, l. c. 235:

> "For these reasons it is clear that the plaintiff has no legal capacity to maintain this action, and that Section 548, Revised Statutes, 1899, is void and without legal force.
>
> [fol. 21] "It would have been within the power of the Legislature, however, to confer express power upon the Illinois administrator to maintain an action, based upon the statute of the State quoted, in the courts of this State, for that would be a mere matter of State comity and not the creation of a new liability and right."

It will clearly be seen from this statement by the Supreme Court of Missouri in the McGinnis case that, with the exception of the existence of capacity, the right of foreign persons to maintain actions in our courts is purely on a comity basis and subject to the reasonable limitations thereof.

The Shaw and Wells cases, even in their obiter statements, only deal with this modification and clearly a distinc-

tion in construing these statutes should be made between the provisions which are mere declarations of a preexisting policy and those provisions which change that policy. As a matter of fact, with the exception of the Newlin case, supra, which held that the application of foreign law was a matter subject to discretionary limitations, the Missouri courts have never construed any portion of these statutes except that requiring the recognition of foreign administrators.

There Is No Need for Legislative Action

All cases dealing with other legislative declarations of comity have consistently held that the doctrine is subject to the discretion of the body charged with its enforcement. See State ex rel, v. State Board of Health, supra. This rule of statutory construction, taken together with the decisions of our sister states in application of the doctrine of comity in similar situations, makes this conclusion obvious. Every [fol. 22] jurisdiction in which we have been able to discover rulings on the matter, save only Minnesota, treated hereafter, has held that the court has inherent power to determine for itself whether it should assume jurisdiction between nonresidents and that this power is uncontestably necessary to the effective performance of judicial functions. Some of the cases in these jurisdictions are:

New York—Murnan v. Wabash R. R. Co., 264 N. Y. 244, 158 N. E. 508; Douglas v. N. Y. & N. H. R. R. Co., 279 U. S. 377;

Illinois—Whitney v. Madden (1948), 400 Ill. 185, 79 N. E. (2d) 593;

Massachusetts—Universal Adj. Corp. v. Bank (1933), 184 N. E. 152; Bethlehem Fab., Inc., v. Watts, 286 Mass. 556, 190 N. E. 829; Lydia Pinkham Med. Co. v. Gove (1937), 298 Mass. 53, 9 N. E. (2d) 573; Pinson v. Potter (1937), 298 Mass. 109, 10 N. E. (2d) 136;

California—Leet v. H. P. R. Co., 155 P. (2d) 42;

New Jersey—Kantakevitch v. Delaware, L. & W. R. Co., 18 N. J. Misc. 77, 10 Atl. (2d) 651 (1940); Standard S. & C. Co. N. Y. v. Cagavel Indust. Corp., 128 N. J. Eq. 104, 15 Atl. (2d) 258 (1940); Anderson v. Delaware, L. & W. R. Co., 18 N. J. Misc. 153, 11 Atl. (2d) 607; James H. Rhodes & Co. v. Chausovsky, 137 N. J. L. 459, 60 Atl. (2d) 623 (1948);

VIII

Conclusion

Although this question has now become one of general interest and importance to the judiciary and bar and also to the public at large due to its effect on the administration of our courts, this court as heretofore shown has not as yet given the matter the studied consideration it merits in any case where its determination was a live appellate issue.

The doctrine of forum non conveniens as heretofore shown has been recognized in such states as New York, Massachusetts, Illinois, Florida, New Jersey, California, New Hampshire, Wisconsin, Louisiana, Pennsylvania, Texas and England. It has also been recognized by the Supreme Court of the United States, and the same court has also ruled that in a Federal Employers' Liability Act case a state court may use its discretionary powers in determining whether to retain jurisdiction, where the litigants are non-residents, without violation to the Federal Constitution.

Considering the foregoing discussion, we believe that this court should order respondent to exercise the discretion which he possesses and rule on the merits of relator's [fol. 26] motion to dismiss cause No. 23161-D, now pending in the Circuit Court of the City of St. Louis.

Respectfully submitted, Kramer, Campbell, Costello & Wiechert, East St. Louis, Illinois, Fordyce, White, Mayne, Williams & Hartman, By Thomas Rowe Schwarz, F. W. Schwarz, St. Louis, Missouri, Attorneys for Relator.

[fol. 27] EXHIBIT A

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI

Cause No. 23161-D. Division No. 1

LELIA M. BLEVINS, Administratrix of the Estate of Roderick E. Blevins, Deceased, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, 721 Olive Street, St. Louis, Missouri, Defendant

Complaint

Plaintiff, for her cause of action against the above named defendant, complains and alleges:

I

That the jurisdiction of the above named Court is based upon the Federal Employers' Liability Act, being an Act of the Congress of the United States, 45 U. S. C. A., Sections 51-60, as hereinafter more fully appears.

II

That at all times herein material, the plaintiff was and now is the duly appointed and legally acting administratrix of the Estate of Roderick E. Blevins, deceased, having been appointed as such administratrix on the 26th day of February, 1947, by the County Court of Sullivan County, Tennessee, a court of suitable and competent jurisdiction.

[fol. 28] III

That at all times herein mentioned, the defendant, Southern Railway Company, a corporation, was being controlled and being operated and managed in interstate commerce transporting interstate commerce between various of the States of the Union, including the States of Virginia, Tennessee and Missouri, and operated its line of railroad through the States of Virginia and Tennessee and into the State of Missouri and into the City of St. Louis, within the jurisdiction of the Circuit Court of the City of St. Louis, Missouri, and the plaintiff's intestate then in his lifetime,

(b) That it became and was the duty of the defendant to establish by rule, custom or practice, a proper, safe and co-ordinated method of switching, moving and hauling cars in said Frisco Yard, but notwith-[fol. 31] standing its duty and obligation in this regard, the defendant negligently, carelessly, wrongfully and unlawfully failed to establish by rule, custom or practice a proper, safe and co-ordinated method of switching, moving or hauling cars in said yard, but permitted said train #65 to be switched, moved and hauled without signal or without maintaining any contact, visual or otherwise, between the crew member in the engine of train #65 and the crew member working on or about the rear end of said train #65.

(c) That it came and was the duty of the defendant, through its servants and agents, in particular the fireman, to keep a constant and vigilant lookout in the direction in which train #65 was proceeding, but the defendant, through its servants and agents, and in particular the fireman, notwithstanding its duty and obligation in this regard negligently, carelessly, wrongfully and unlawfully failed to keep a constant and vigilant lookout in the direction in which said train #65 was proceeding and as a direct and proximate result thereof, the plaintiff's intestate sustained the injuries from which he subsequently died.

(d) That it became and was the duty of the defendant, through its engineer, to stop said train #65 when it knew, or by the exercise of ordinary care should have known, that the plaintiff's intestate was dangling helplessly from said car as aforesaid, and being dragged onto said trestle, but the defendant, notwithstanding its duty and obligation in this regard did through its engineer negligently, carelessly and wrongfully, and unlawfully fail to stop said train #65 when it knew, or in the exercise of reasonable care should have known, that the plaintiff's intestate was dangling helplessly from said car as aforesaid and being dragged onto said trestle and as a direct and proximate result of the de-[fol. 32] fendant's negligent conduct, the plaintiff's intestate was dragged a distance, of to-wit: two hundred (200) feet and was caused to be thrown and hurled

from said trestle to the ground below, sustaining injuries from which he subsequently died.

(e) That it became and was the duty of the defendant, through its servants and agents the engineer and fireman of train #65, to observe, heed and obey all signals relayed to it by the train crew, of said train #65, but notwithstanding its duty and obligation in this regard, the defendant, through its engineer and fireman, negligently, carelessly, wrongfully and unlawfully failed to observe, heed and obey the signal of the brakeman of said train who was then and there giving a violent stop signal, and as a direct and proximate result of said failure, the plaintiff's intestate sustained the injuries from which he subsequently died.

X

That as a direct and proximate result of one or more of the aforesaid negligent acts of the defendant as aforesaid, plaintiff's intestate sustained injuries resulting in his death on November 25, 1946.

XI

Plaintiff alleges that between the time the plaintiff's intestate was injured and the time he died as a direct result of said injuries, plaintiff's intestate suffered excruciating conscious bodily and mental pain and suffering, and on account thereof, plaintiff is entitled to recover damages for conscious pain and suffering sustained by plaintiff's intestate for the benefit of his heirs at law and his beneficiaries.

[fol. 33]

XII

Plaintiff alleges that prior to the occurrence herein mentioned above, plaintiff's intestate was a strong, healthy, able-bodied man, fifty-eight (58) years of age, and that he was earning and capable of earning large sums of money, to-wit: $325.00 per month; that he left surviving him as his sole heir at law and beneficiary, Lelia M. Blevins, his widow, who was dependent upon him for support; that by reason of the untimely death of plaintiff's intestate, this plaintiff is entitled to recover the damages and pecuniary loss suffered and sustained by the heir at law and beneficiary of plaintiff's intestate.

[fol. 39] EXHIBIT C

IN THE CIRCUIT COURT, CITY OF ST. LOUIS

LELIA M. BLEVINS, Administratrix, etc.,

v.

SOUTHERN RAILWAY COMPANY, a corporation

No. 23161-D. Room #1. March 14th, 1949.

Memorandum for Clerk.

Defendant's motion to dismiss on the ground of forum non conveniens denied upon the sole ground that in the opinion of the Court the Court has no jurisdiction or discretion to entertain or grant such a motion. Court's memo filed.

William L. Mason, Judge.

[fol. 40] EXHIBIT D

STATE OF MISSOURI,
City of St. Louis, ss.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI

No. 23161-D

LELIA M. BLEVINS, Administratrix of the Estate of Roderick E. Blevins, Deceased, Plaintiff,

v.

SOUTHERN RAILWAY COMPANY, a corporation, Defendant

Memorandum of Court

We have carefully considered the authorities set out in the extensive and able brief of learned counsel for the defendant but are of the opinion that our Supreme Court has announced in no uncertain terms that we have no discretion to dismiss a case merely on the ground of inconvenience and on the ground that such cases clog our dockets and burden the court with litigation that should have been

brought elsewhere to the detriment of our local litigants and at the expense of our taxpayers. Such consideration might well appeal to the legislature to vest our trial courts with such discretion, but in the opinion of our Supreme Court our legislature has not done so by any statute heretofore enacted but, on the contrary, has placed upon our courts the burden of taking jurisdiction in Federal Em- [fol. 41] ployers Liability cases wherever the cause of action may have accrued and wherever the parties and witnesses may reside. Our Supreme Court stated, as set out in the very frank brief of the defendant, quoting from the case of Bright v. Wheelock, 20 S. W. (2d) 684, as follows:

> "* * * However, our own court has not construed the (somewhat similar) statutes of this state (sections 1163 and 1180, R. S. 1919) to invest the courts of this state with the discretion to refuse to entertain jurisdiction of such a suit. Our previous rulings, as announced in the Shaw, Wells, and Foraker cases, supra, appear to be to the effect that our statutes, supra, do not invest the courts of our state with such discretion, and we see no good or sufficient reason for overruling, at this time, our prior decisions construing such statutes. It would seem to us that the correction of the evil (herein complained of by respondents), if there be any evil, lies with the legislature rather than with the judiciary. The giving of plaintiff's instruction No. 5 was proper under the law as announced by this court in the cases, supra, and was not error, and hence the trial court erred in predicating the order, granting a new trial, upon the specified ground of 'error in giving instruction No. 5 for plaintiff.'"

Instruction No. 5 was as follows:

> "The court instructs the jury that if you find that the defendants at the time and place in question were engaged in commerce between states as defined in instruction No. 1, then the plaintiff had the right to bring and prosecute this suit in this county and state and the fact that the Chicago & Alton Railroad Company is incorporated in Illinois, or that the plaintiff and defendants are residents of that state, or that the injury occurred there, or that plaintiff might have

[fol. 42] sued in the courts of that state, does not constitute a defense to this cause of action."

Learned counsel for defendant argue quite persuasively that this is dictum and not decision of the Court. We do not so interpret it and do not regard ourselves as having any right to disregard it.

If counsel for defendant consider it desirable to get a prompt ruling upon the correctness of our decision, we suggest that we see no reason why a mandamus proceeding against us to compel us to take the jurisdiction now invoked would not accomplish that purpose.

William L. Mason, Judge.

[fol. 43] In Supreme Court of Missouri

[Title omitted]

41461

Order—April 11, 1949

Now at this day, on consideration of the petition for a writ of mandamus, the court doth order that an alternative writ of mandamus issue herein, as prayed, directed to the said respondent, said writ to be returnable in thirty days to the court en banc.

In the Supreme Court of Missouri

41461

[Title omitted]

Alternative Writ of Mandamus

The State of Missouri:

To William L. Mason, Judge of the Circuit Court of the City of St. Louis presiding in Division No. One, Greeting:

Whereas, it has been represented to the Supreme Court of the State of Missouri, on the part of relator, Southern Railway Company, a corporation, as indicated and set forth

The Bright case, supra, came to the Court on plaintiff's appeal from the trial Court's order granting defendant a new trial. The Court, in paragraph I of the opinion, sustained the trial Court's order on the ground that certain cross-examination was prejudicial error. Paragraph II of the opinion began thus:

> "Since this cause must be remanded for a retrial for the reasons stated in paragraph I of this opinion, it may be well for us to discuss, somewhat briefly, the two other grounds, or reasons, upon which the trial court predicated the order granting a new trial. One of such grounds was that the court erred in giving, at the request of plaintiff, instruction No. 5, which [fol. 67] reads: 'The court instructs the jury that if you find that the defendants at the time and place in question were engaged in commerce between states as defined in instruction No. 1, then the plaintiff had the right to bring and prosecute this suit in this county and state and the fact that the Chicago & Alton Railroad Company is incorporated in Illinois, or that the plaintiff and defendants are residents of that state, or that the injury occurred there, or that plaintiff might have sued in the courts of that state, does not constitute a defense to this cause of action.' " l. c. 698.

This instruction was held proper. In its discussion, the Court took note of the holding of the United States Supreme Court in the Douglas case and stated:

> "* * * However, our own court has not construed the (somewhat similar) statutes of this state (sections 1163 and 1180, Rev. St. 1919) to invest the courts of this state with the discretion to refuse to entertain jurisdiction of such a suit. Our previous rulings, as announced in the Shaw, Wells and Foraker Cases, supra, appear to be to the effect that the statutes, supra, do not invest the courts of our state with such discretion, and we see no good or sufficient reason for overruling, at this time, our prior decisions construing such statutes * * *", l. c. 700.

In paragraph III the Court said:

> "Respondents urge that the order granting a new trial is sustainable upon other grounds, assigned in

in a certain petition for a writ of mandamus, a copy of which is hereto attached and made a part hereof:

Now, Therefore, we being willing that due and speedy justice be done the said petitioner, in this behalf, Command you, the said William L. Mason, as Judge of the Circuit Court of the City of St. Louis, to set aside your order of March 14, 1949, in a cause entitled Lelia M. Blevins, administratrix of the estate of Roderick E. Blevins, deceased, plaintiff, versus Southern Railway Company, a corporation, defendant, No. 23,161-D, and to exercise your proper jurisdiction and to determine on the merits the issues presented by defendant's motion to dismiss, or that you show cause, if any you have, before the Supreme Court of the State of Missouri, en banc, on or before the 11th day of May, 1949, why you should not do so.

[fol. 44] Herein fail not at your peril.

In Testimony Whereof, I have hereto set my hand and affixed the seal of said court at my office in the City of Jefferson this 12th day of April, 1949.

Marion Spicer, Clerk, Supreme Court. (Seal.)

And thereafter and on the 11th day of May, 1919, there was filed in said cause respondent's return to said Alternative writ, which Return is in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI

No. 41461

[Title omitted]

RETURN TO ALTERNATIVE WRIT OF MANDAMUS—Filed May 11, 1949

Comes now William L. Mason, Judge of the Circuit Court of the City of St. Louis, Missouri, Respondent above named, and, for his return to the alternative writ of mandamus issued herein:

1. Admits the allegations of paragraphs numbered 1, 2, 3, 4, 5, 6, 7 and 8 of Relator's petition for writ of mandamus herein.

2. Admits the allegations of paragraph numbered 9 of Relator's petition for writ of mandamus to the effect that

defendants' motion for new trial, but not specified by the trial court in the order granting a new trial. It is unnecessary to discuss such matters, inasmuch as the order granting a new trial must be affirmed upon the ground, and for the reasons, stated in paragraph I hereof." l. c. 700.

[fol. 68] The discussions in paragraphs II and III in the Bright case manifestly are unnecessary to the determination of the appeal. The Court clearly states that the remand is made because of the improper cross-examination.

Thus, in none of these cases has the Court had before it on appeal the question of the power of a trial Court to apply the doctrine of forum non conveniens. Decisions on the capacity of a plaintiff to sue or the jurisdiction of the selected Court are not in point. In order to make a judicial decision binding, under the rule of stare decisis in a subsequent case, "there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide" the point "in contestation". Carroll v. Carroll, 16 Howard 275, 287, 14 L. Ed. 936. Respondent, therefore, was not precluded by case law from hearing relator's motion on the merits.

D. Sections 856-7, Missouri Revised Statutes Annotated, do not purport to divest respondent of the power to entertain relator's motion.

Relator contends that the Legislature has not the power to take from a Missouri Court the fundamental right to apply the principles of forum non conveniens in a proper case. It is submitted, however, that the Legislature has made no attempt to do so. Sections 856-7, Mo. R. S. A., are merely legislative declarations of comity. Newlin v. Railway Co., 222 Mo. 375, 121 S. W. 125; McGinnis v. Missouri Car & Foundry Co., 174 Mo. 225, 73 S. W. 586. As late as 1933 this Court quoted with approval from the Newlin case:

> "In this connection we observe: Our statutes • • • opening the doors of our courts to causes of action accruing under laws of our sister states, are legislative declarations of comity. Comity, in a legal sense, is [fol. 69] complaisance, courtesy, the granting of a

respondent, has, by his order of March 14, 1949, refused to rule upon the merits of Relator's motion to dismiss, duly filed in said Cause No. 23161-D in the Circuit Court of the City of St. Louis, Missouri; and denies each and every other allegation of said paragraph of said petition.

3. Admits the allegations of paragraph numbered 10 of Relator's petition for a writ of mandamus to the effect that there are now pending in said Circuit Court numerous actions involving similar circumstances, and others are con- [fol. 45] tinually being filed, but denies each and every other allegation of said paragraph of said petition.

4. Denies the allegations of paragraph numbered 11 of Relator's petition for writ of mandamus herein.

For further return to the alternative writ of mandamus, this Respondent states and avers that:

I. Relator, Southern Railway Company, is a corporation engaged and engaging in the business of owning and operating a line and system of railroad as a common carrier, transporting freight and pasengers for hire, in interstate and intrastate commerce.

II. Relator, Southern Railway Company, maintains and operates in the City of St. Louis, Missouri, offices for the transaction of its business, designated as "General Offices," and daily operates trains into and out of said City of St. Louis, Missouri, in interstate commerce and transportation.

III. On or about the 13th day of October, 1948, there was filed in the Circuit Court of the City of St. Louis, Missouri, a petition in an action in which Lelia M. Blevins, administratrix of the estate of Roderick E. Blevins, deceased, was designated as plaintiff, and in which Relator here, Southern Railway Company, was designated as defendant, wherein the plaintiff sought damages against defendant in the sum of $100,000.00. In said petition, it was averred that the action was brought under the Federal Employer's Liability Act (45 USCA Secs. 51-60) to recover damages for the death of plaintiff's decedent, which allegedly resulted from negligence of the defendant (Relator here) in a train movement in a railroad yard of defendant (Relator here), known as the "Frisco Yard" and located partly in the State of Tennessee and partly in the State of Virginia, while

plaintiff's decedent was engaged in interstate commerce and transportation in the course and scope of his employment by defendant (Relator here) as a train conductor. Said petition, and the action founded thereon, were and are [fol. 46] numbered in said Circuit Court of the City of St. Louis, Missouri, as No. 23161-D. A copy of said petition in said cause No. 23161-D is attached to Relator's petition herein as Exhibit A thereto, and is here incorporated by reference.

IV. Summons was duly issued for defendant (Relator here) in said cause in said Circuit Court of the City of St. Louis, Missouri, and was, on October 15, 1948, duly served upon the defendant in said cause (Relator here).

V. On or about November 15, 1948, defendant in said cause in said circuit court (Relator here) duly filed in said cause its motion to dismiss said cause entitled "Motion to Dismiss on the Ground of Non Conveniens," a copy of which motion is attached to Relator's petition herein as Exhibit B thereto and is here incorporated by reference. Said motion sought to have said action in said Circuit Court of the City of St. Louis, Missouri, dismissed under the doctrine of "forum non conveniens", it being averred therein substantially that: (1) The plaintiff in said action, at the time the cause of action therein accrued, and now, resides in or near the City of Bristol, Tennessee, which is located about 691 miles from the City of St. Louis, Missouri; (2) the City of Appalachia, Virginia, is within 100 miles of Bristol, Tennessee, and is about 761 miles from the City of St. Louis, Missouri; (3) that in both cities of Bristol, Tennessee, and Appalachia, Virginia, there are courts of general jurisdiction having jurisdiction over causes of action as that alleged in said petition in said cause in the said Circuit Court of the City of St. Louis; (4) that at the trial of said cause in said Circuit Court of the City of St. Louis, Missouri, defendant therein (Relator here) will require the attendance and testimony of eight of its employees who reside in Bristol, Tennessee, or Appalachia, Virginia, and a doctor who resides in Kingsport, Tennessee, and plaintiff therein will require the attendance and testimony of three witnesses who reside [fol. 47] within 100 miles of Bristol, Tennessee, and Appalachia, Virginia; (5) the cost of securing the attendance of such witnesses for defendant (relator here) at St. Louis,

Missouri, would exceed $1,280.00 and would greatly exceed the cost of securing their attendance at either Bristol, Tennessee, or Appalachia, Virginia; (6) the trial of said cause will require approximately four days, and if the doctor mentioned will attend the trial at St. Louis, Missouri, his practice will be interrupted for six days, while it would be interrupted for only one day if the trial were held at either Bristol, Tennessee, or Appalachia, Virginia; (7) it is possible, and, in fact, probable, that at a trial of said cause it might be proper and material for the jury to view the premises where the fatal injuries to plaintiff's decedent occurred, which would be impossible if plaintiff's said cause were tried in the City of St. Louis, Missouri; (8) and there is ample time remaining within which plaintiff in said cause may file a petition in the States of Virginia or Tennessee on her cause of action, so that, if her action in the Circuit Court of the City of St. Louis be dismissed, without prejudice, she would not be deprived of her rights nor barred from maintaining suit in the States of Virginia or Tennessee.

VI. On the 11th day of February, 1949, said motion to dismiss was presented, argued and submitted in Division No. 1 in said Circuit Court of the City of St. Louis, Missouri, to this Respondent as Judge of said Court, and, thereafter, in due course, parties to said cause submitted to this Respondent, for his consideration, their respective memorandum briefs.

VII. On the 14th day of March, 1949, this Respondent, as Judge of said Division of said Circuit Court of the City of St. Louis, Missouri, entered an order in said cause in said Court, ruling on said motion to dismiss, in words and figures as follows, to wit:

> [fol. 48] "Defendant's motion to dismiss upon the ground of forum non conveniens denied upon the sole ground that in the opinion of the Court, the Court has no jurisdiction or discretion to entertain or grant such a motion. Court's memo filed."

And this Respondent then and there filed a memorandum in said cause setting out some of the reasons which induced him to so rule on said motion, a copy of which said memorandum is attached to Relator's petition herein as Exhibit D thereto and which is here incorporated by reference.

VIII. Said Circuit Court of the City of St. Louis, Missouri, is a court of general jurisdiction, has had at all times since October 14, 1948, full and complete jurisdiction of the subject matter of said Cause No. 23161-D therein, and has had at all times since November 15, 1948, and now has, full and complete jurisdiction of and over the parties to said cause.

IX. The existence of jurisdiction in said Circuit Court of the City of St. Louis, Missouri, of and over both the subject matter of and the parties to said cause of action numbered 23161-D creates an implication of a duty to exercise such jurisdiction, and that the exercise of such jurisdiction may be onerous does not militate against that implication.

X. Under the applicable statutes, and the controlling decisions of the Supreme Court of the State of Missouri, and of the United States of America, and under the applicable provisions of the constitutions of the State of Missouri and the United States of America, the said Circuit Court of the City of St. Louis, Missouri, and this Respondent as one of the judges thereof, were and are without jurisdiction or discretion to entertain the said motion to dismiss filed by defendant in the said cause No. 23161-D in said Circuit Court (Relator here).

[fol. 49] Wherefore, having fully made return to the alternative writ of mandamus, Respondent prays that said alternative writ of mandamus be quashed.

Jos. B. McGlynn, Spivey Building, East St. Louis, Illinois. Jerome F. Duggan, 706 Chestnut Street, St. Louis, Missouri. Roberts P. Elam, 892 Arcade Building, St. Louis, Missouri, Attorneys for William L. Mason, Judge of the Circuit Court of the City of St. Louis, Missouri, and his successors, as presiding Judge of said Court, Respondents.

Due service of the above return is hereby acknowledged this 9th day of May, 1949.

F. W. Schwarz, Attorney for Relator.

[fol. 50] Caption omitted.

[fols. 51-52] Notice Omitted

[fol. 53] IN THE SUPREME COURT OF MISSOURI

No. —

STATE OF MISSOURI ex rel. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, Relator,

vs.

THE HONORABLE DAVID J. MURPHY, Judge of the Circuit Court of the City of St. Louis, Missouri, and His Successors, as Presiding Judge of Said Court, Respondent

Original Proceeding in Mandamus

PETITION FOR WRIT

To the Honorable Judges of the Supreme Court of Missouri:

Comes now The Atchison, Topeka and Santa Fe Railway Company, a corporation, relator above named, and respectfully states and shows to the Court:

1. That it is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Kansas and duly authorized to do business in the State of Missouri.

2. That respondent, David J. Murphy, is the duly elected, qualified, and commissioned Judge of the Circuit Court of the City of St. Louis, State of Missouri, succeeding William L. Mason who was on or about January 1, 1949, duly appointed and was at all material times herein mentioned [fol. 54] Presiding Judge; respondent is now Presiding Judge in Division No. 1 of said Circuit Court, and his predecessor, William L. Mason, made and entered of record the order hereinafter complained of, refusing to entertain jurisdiction and exercise discretion and rule on the merits of the issues presented by relator's motion to dismiss cause No. 26165-D pending in said Court. And relator further represents that all motions in connection with pleadings in law cases prior to trial are heard and determined in Division No. 1 of said Circuit Court.

3. Relator, The Atchison, Topeka and Santa Fe Railway Company, further states that on or about September 2, 1948, Floyd P. Seachris filed a suit against The Atchison,

Topeka and Santa Fe Railway Company, a corporation, defendant (relator herein), said action being numbered 21990-D; that the trial of said case No. 21990-D was commenced in Division No. 5 of the Circuit Court of the City of St. Louis before Judge Mayfield on February 7, 1949; that plaintiff's case was put in evidence; and that on February 9, 1944, during the introduction of evidence by the defendant (relator herein) plaintiff voluntarily dismissed without prejudice.

4. That thereafter on February 15, 1949, Floyd P. Seachris again filed an action in the Circuit Court of the City of St. Louis, State of Missouri, against The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant, said action being numbered 26165-D; that the petition in cause No. 26165-D is identical to the petition filed in cause numbered 21990-D and a copy thereof is hereto attached and marked Exhibit A.

5. That summons in said cause was issued and served upon defendant on February 17, 1949.

6. That said cause of action arises out of an alleged accident occurring in Waynoka, Oklahoma, and plaintiff seeks damages in the amount of $100,000. Plaintiff and [fol. 55] defendant in said cause are non-residents of the State of Missouri and jurisdiction is based on the Federal Employers' Liability Act.

7. That on April 25, 1949, relator duly and promptly filed its motion to dismiss said action, cause No. 26165-D, in the Circuit of the City of St. Louis, State of Missouri, on the ground of forum non conveniens. Said motion is attached hereto and marked Exhibit B.

8. That thereafter on the 4th day of May, 1949, said motion was presented and submitted in Division No. 1 of the said Circuit Court and to William L. Mason, Judge thereof, duly qualified as aforesaid.

9. That on the 4th day of May, 1949, ruling on said motion was made in words and figures as follows:

> "Defendant's motion to dismiss upon the ground of forum non conveniens denied upon the sole ground that in the opinion of the Court the Court has no jurisdiction or discretion to entertain or grant such a motion.
>
> William L. Mason, Judge."

A copy of said order is attached hereto and marked Exhibit C.

10. Relator further states that respondent's predecessor, by his order of May 4, 1949, has refused to rule upon the merits of relator's motion, duly filed in said cause No. 26165-D and refused to exercise his proper discretion and jurisdiction, and that unless respondent is ordered and compelled to set aside and vacate Judge William L. Mason's said order dated May 4, 1949, and to exercise his proper discretion and jurisdiction in said cause, relator will be compelled to engage in long, expensive, burdensome and vexatious litigation and has no other adequate remedy.

[fol. 56] 11. That there are now pending in said Circuit Court numerous actions involving similar circumstances and that others are continually being filed, and the refusal of respondent to exercise his proper jurisdiction presents questions of extraordinary importance and interest.

12. That it is without an adequate remedy in the premises unless this Honorable Court will transfer and grant it a writ of mandamus as hereinafter prayed.

Wherefore, relator prays that this Honorable Court issue its alternative writ of mandamus commanding that respondent or his successor set aside the said order of May 4, 1949, in cause No. 26165-D and to exercise his proper jurisdiction and to determine on the merits the issues presented by relator's said motion to dismiss, heretofore filed in said cause No. 26165-D aforesaid; or, failing that, that respondent or his successors show cause why he should not so vacate said order and proceed to exercise his proper jurisdiction and discretion in the premises and that upon a hearing hereof, the direction of said alternative writ be made permanent and that the proceedings in said cause No. 26165-D, now pending in the Circuit Court of the City of St. Louis, State of Missouri, be stayed until such hearing and for such other and further relief as to this Honorable Court seem meet and proper in the premises.

John H. Lathrop, Sam D. Parker, Donald H. Sharp, 1200 Land Bank Building, Kansas City 6, Missouri, Tel. VI-0820, Walter R. Mayne, Fred W. Schwarz, 506 Olive Street, St. Louis 1, Missouri, Tel. GA-2660, Attorneys for Relator.

[fol. 57] *Duly sworn to by Donald H. Sharp. Jurat omitted in printing.*

[fol. 58] SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

I

Statement of Facts

In September, 1948, Floyd P. Seachris, a resident of the State of Oklahoma, brought an action under the Federal Employers' Liability Act in the Circuit Court of the City of St. Louis against defendant The Atchison, Topeka and Santa Fe Railway Company, a corporation organized and existing under the laws of the State of Kansas, having no track and operating no trains in the City of St. Louis, Missouri. The accident out of which the suit arose allegedly occurred in Waynoka, Oklahoma. The trial was commenced on February 7, 1949, and defendant brought eight witnesses to St. Louis from Waynoka, Oklahoma. After the introduction of plaintiff's case and during the introduction of evidence by defendant on February 9, plaintiff voluntarily dismissed without prejudice. On February 15, 1949, plaintiff again filed suit against this defendant, the petition being identical to that filed in the first case. Thereafter, in due time, relator, defendant in said action, filed its motion to dismiss the cause without prejudice for the reason that the bringing of said cause unduly burdens and inconveniences the defendant and the witnesses, and unnecessarily burdens the Court, citizens and taxpayers of the City of St. Louis. The motion was presented to respondent's predecessor and on May 4, 1949, he entered the order complained of, ruling that he had no jurisdiction or discretion to entertain said motion. A similar motion was identically ruled by Judge Mason in the case of Lelia M. Blevins, Administratrix of the Estate of Roderick E. Blevins, plaintiff, v. Southern Railway Company, a corporation, defendant, No. 23161-D, the Court therein in a [fol. 59] memorandum opinion based his refusal to entertain jurisdiction upon the case of Bright v. Wheelock, 20 S. W. 2d 684, and the interpretation allegedly given therein to Sections 1163 and 1180 of the Missouri Revised Statutes 1919. In the Blevins case, this Court, on the same issue as

is present here, has heretofore granted its alternative writ of mandamus. For relief from the ruling of respondent on this relator's motion to dismiss the action filed by Floyd P. Seachris, this relator seeks a writ of mandamus from this court.

II

This Court Has Jurisdiction to Entertain This Petition and Ought to Exercise It

The Supreme Court of Missouri has original jurisdiction to entertain petitions for writs of Mandamus and to exercise control over the inferior Courts in its jurisdiction. Missouri Constitution 1945, Article V, Section 4. The existence of concurrent jurisdiction to issue such remedial writs is in no wise a limitation upon the jurisdiction of this Court to entertain this original petition and to issue this writ. State ex rel. v. Tracy, 94 Mo. 217; State ex rel. Deering (banc), 173 Mo. 492, l. c. 510; State ex rel. Grimm (banc), 220 Mo. 483.

III

The Question of Law Presented by Judge Mason's Ruling Is of Great Importance, and This Court Should, Therefore, Exercise Its Powers

The question of law raised by Judge Mason's ruling that he is without jurisdiction or discretion to entertain relator's motion is of general interest and extreme importance to the bar, the Courts and the taxpayers. The increasing frequency with which these Federal Employers' Liability [fol. 60] Act cases are being filed in the Circuit Court of the City of St. Louis by non-resident plaintiffs against non-resident defendants on causes of action arising far distant from St. Louis crowds from the docket the cases between residents and burdens local taxpayers with the expense of trials which in at least some instances ought to be tried elsewhere. In the instant case, for example, the St. Louis Court is asked to hear and St. Louis taxpayers asked to pay a second time the expense of trial of a suit brought by an Oklahoma resident against a Kansas corporation. This case was imported a distance of 647 miles, tried for two days, dismissed without prejudice and is now refiled. The crowding of the docket of the St. Louis Courts and the burden upon the litigants and the taxpayers of

St. Louis by importing such lawsuits raise a problem of vital importance.

IV

Mandamus Is the Proper Remedy

Mandamus is the proper and appropriate remedy to compel judges of inferior courts to hear and determine all issues properly presented, and it is the duty of this Court to require judges of such inferior Courts to exercise their full and whole jurisdiction. State ex rel. v. Brown, 332 Mo. 222, 48 S. W. 2nd 857, l. c. 859; State ex rel. v. Haid (banc), 327 Mo. 567, l. c. 573-4; State ex rel. v. Trimble (banc), 303 Mo. 284, l. c. 291.

V

Relator Has No Other Adequate Remedy

Relator has no other adequate remedy because trial will ensue and the prospective injury to relator, the Court, the taxpayers, and the administration of justice will have become an accomplished fact.

[fol. 61]

VI

Respondent Has Jurisdiction to Entertain Relator's Motion

A. Missouri Circuit Courts were created with and long held the power to apply the principles of forum non conveniens.

Except as limited by the Constitution or by statute, our Circuit Courts have all the rights and powers of the English Chancery and the common law courts. Chicago, B. & Q. Ry. Co. v. Gildersleeve, 219 Mo. 170, 118 S. W. 86; State ex rel. South Missouri Pine Lumber Company v. Deering, 180 Mo. 53, 79 S. W. 454.

Unless repealed or modified, the common law is in effect in Missouri under Sec. 645, Mo. R. S. A., 1939, and for the purpose of the application of this section, courts are at liberty to look to the decisions of the other states as well as to those of the English Courts. Dickey v. Volker, 321 Mo. 235, 11 S. W. 2d 278, 285; Hawkinson v. Johnston, C. C. A. (8) 1941, 122 Fed. 2d 724.

At common law the courts of both England and this country have the discretionary power to refuse jurisdiction

in a case where the parties are non-residents and which in the interests of justice ought to be tried elsewhere. Gulf Oil Co. v. Gilbert, 330 U. S. 501, 507, 91 L. Ed. 1055. It is now settled that nothing in either the Federal Constitution or the Federal Employers' Liability Act precludes the application of forum non conveniens to a case such as the one at bar, Douglas v. N. Y. & N. H. R. R. Co., 279 U. S. 377, and in every jurisdiction we find which has ruled upon the question, except Minnesota, it has been held that the Court has inherent power to determine for itself whether it should assume jurisdiction between non-residents. The following are some of these cases:

[fol. 62] New York—

Murnan v. Wabash R. R. Co., 264 N. Y. 244, 158 N. E. 508;

Douglas v. N. Y. & N. H. R. R. Co., 279 U. S. 377;

Illinois—

Whitney v. Madden (1948), 400 Ill. 185, 79 N. E. (2) 593;

Massachusetts—

Universal Adj. Corp. v. Bank (1933), 184 N. E. 152;

Bethlehem Fab., Inc., v. Watts, 286 Mass. 556, 190 N. E. 829;

Lydia Pinkham Med. Co. v. Gove (1937), 298 Mass. 53, 9 N. E. (2) 573;

Pinson v. Potter (1937), 298 Mass. 109, 10 N. E. (2) 136;

California—

Leet v. H. P. R. Co., 155 P. (2) 42;

New Jersey—

Kantakevitch v. Delaware, L. & W. R. Co., 18 N. J. Misc. 77, 10 Atl. (2) 651 (1940);

Standard S. & C. Co. N. Y. v. Caravel Indust. Corp., 128 N. J. Eq. 104, 15 Atl. (2) 258 (1940);

Anderson v. Delaware, L. & W. R. Co., 18 N. J. Misc. 153, 11 Atl. (2) 607;

James H. Rhodes & Co. v. Chausovsky, 137 N. J. L. 459, 60 Atl. (2) 623 (1948);

New Hampshire—

Jackson & Sons v. Lumbermen's Mut. Cas. Co., 168 Atl. 895 (1933);

Wisconsin—

State ex rel. Goldwyn v. Gehrz (1923), 181 Wis. 238, 194 N. W. 418;

[fol. 63] Louisiana—

Stewart v. Liefenberg (1920), 86 So. 734, 148 La. —;

Florida—

Hagen v. Viney (1936), 169 So. 391, 124 Fla. 747;

Pennsylvania—

Overfield v. Pennroad Corp., 113 F. (2) 6 (C. C. A. Pa.);

Texas—

Morris v. Mo. Pac. R. Co. (1890), 78 Tex. 17, 14 S. W. 228, 9 L. R. A. 349;

U. S.—

Gulf Oil Co. v. Gilbert, 91 L. Ed. 1055, 330 U. S. 501.

And many English cases.

Unless divested of it in some way, our Circuit Court, being a court of general jurisdiction, vested with common law powers and charged by Sec. 645, R. S. 1939, with the duty of applying the common law, has the same right as the Courts of the above listed states to decline its facilities to non-residents when the interests of equity and justice so dictate. That this is true was recognized by this court in State ex rel. v. Grimm (banc), 239 Mo. 135, 179-180, 143 S. W. 483, 497 (hereinafter discussed): "Prior to such enactments [Sections 1736-1737, R. S. 1909] it was generally considered and understood that the right of a non-resident of this state to sue on a cause of action arising in some other state, in the Courts of this state, rested purely upon comity and that our Courts could, in any case where they deemed it wise and proper, decline to assume jurisdiction over or to try the case * * *." It follows that unless our Courts have in some way lost this power, they may still decline to assume jurisdiction if it is wise and proper to do so.

[fol. 64] B. This fundamental and inherent right of a Court to resist misuse of venue and imposition upon its jurisdiction cannot be divested by legislative action.

It is axiomatic that there are certain fundamental judicial powers of which the Courts cannot be deprived by statute. This Court consistently has held that among these powers are the power to punish for contempt, the power

to appoint counsel for the indigent, State ex rel. Gentry v. Becker, 351 Mo. 769, 174 S. W. 2nd 181, and the power to regulate the practice of law, Clark v. Austin, 340 Mo. 467, 101 S. W. 2nd 975. Another fundamental power of the Courts is the discretion exercised in granting continuances, and any attempt by the Legislature to exclude the exercise of the discretion of the Court is an encroachment of one department of government upon the functions of another, prohibited by Article III, Constitution of 1875, now Article II, Constitution of 1945. Kyger et al. v. Koerper (banc), 355 Mo. 772, 207 S. W. 2nd 46.

The right to exercise its judicial discretion and refuse its forum to a case which if tried in its forum would work unnecessary hardship and injustice is a judicial power as fundamental and inherent as are any of the above mentioned powers. It is simply the power of a Court to resist imposition upon its jurisdiction even when jurisdiction is authorized by venue statutes. Gulf Oil Co. v. Gilbert, supra. The power is recognized, we believe, in every Court, except Minnesota, which has considered it. It is incontestably necessary to the effective performance of judicial functions that this discretionary power should be preserved and not denied. Kantakevich v. Delaware L. & W. R. Co., 10 Atl. 2nd 651, 652, 18 N. Jersey Misc. 77; Mr. Paxton Blair, 29 Columbia Law Review 1. Like other fundamental judicial powers such as the discretion to grant or deny continuances, this power cannot be annulled by the Legislature and any attempt to do so by statute would be unconstitutional [fol. 65] as an encroachment by the Legislature upon the functions of the judiciary.

C. Prior decisions do not require the ruling that the Court has no jurisdiction or discretion to rule upon the merits of relator's motion.

Judge Mason's memorandum opinion filed in the case of Lelia M. Blevins, Administratrix of the Estate of Roderick E. Blevins, Deceased, v. Southern Railway Company, No. 21361-D, refusing to hear a similar motion, claims to find support in certain language of the opinion in Bright v. Wheelock, 323 Mo. 840, 20 S. W. 2nd 684. This case refers for authority to Wells v. Davis, 303 Mo. 388, 261 S. W. 58; State ex rel. Foraker v. Hoffman, 309 Mo. 625, 274

S. W. 362; and Shaw v. The Chicago & Alton R. R. Co., 314 Mo. 123, 282 S. W. 416.

An earlier case, State ex rel. v. Grimm, supra, came before the Court on a writ of prohibition by a nonresident defendant seeking an order prohibiting the Circuit Court from further proceeding in an action brought by a nonresident plaintiff on an insurance contract. The defendant contended, among other things, that jurisdiction should not be entertained because to do so would work injustice upon defendant. The Court's opinion squarely predicates itself upon the proposition that the lower Court was required by the Federal Constitution to entertain the suit. That this was erroneous is now settled. Douglas v. N. Y. & N. H. R. R. Co., supra; Gulf Oil Co. v. Gilbert, supra. The Grimm case also examined Newlin v. St. Louis & S. F. R. Co., 222 Mo. 375, 121 S. W. 125, which held that the statutes granting a non-resident plaintiff the right to sue in Missouri were expressions of comity. The Grimm case erroneously interpreted this to mean that it was "mandatory, in harmony and in keeping with * * * the Constitution of the United States * * *" for a State Court to [fol. 66] entertain such a suit. The Grimm case is proved wrong in its interpretation of the Federal Constitution and relator submits is manifestly wrong in its interpretation of the meaning of a statutory enactment of comity.

The Wells case, supra, merely held that an Arkansas administratrix had the capacity to sue a Missouri corporation in a Missouri Court.

In the Foraker case, supra, the defendant, again a Missouri corporation, contended that the statute providing for suit against a railroad in any county where it transacts business is unconstitutional as imposing an unreasonable burden on interstate commerce. The case decided that the statute is constitutional and that the lower Court had jurisdiction.

In the Shaw case, supra, 314 Mo., l. c. 125, the error assigned was that the Illinois administratrix "has no right or authority to maintain this suit in Missouri and the trial court erred in not sustaining the motion to dismiss." The Court relied on the Wells case for authority affirming plaintiff's capacity to sue.

privilege not of right, but of good will. Black's L. Dict., tit. 'Comity.' Now, in reason, courtesy in that behalf has its useful limitations. It may not run riot; it goes circumspectly. It must be courtesy in fact as well as name." State ex rel. Walker v. State Board of Health, 61 S. W. 2nd, l. c. 927.

In order to hold that these sections purport to require respondent to refuse to entertain relator's motion, it is not enough to fail to find within these sections words which "invest" a Circuit Court with the power to apply the principles of forum non conveniens, as was suggested in the dicta of the Bright case. As heretofore shown, this fundamental power is not derived from a statute. The cases in the New York Courts, for example, may be searched in vain for any indication that the power is predicated upon a statute. The question is not whether a statute has "invested" the Courts with this power, but rather whether the Court has by any means been "divested" of the power. It is submitted that like the statutes of New York the statutes of Missouri can be searched in vain for any word which makes it mandatory that a Missouri Court hear every case brought by non-residents against non-residents. Not a word suggests the intent of the Legislature to take away from the Courts this fundamental power to apply the principles of forum non conveniens.

Conclusion

The doctrine of forum non conveniens is now being applied in other State Courts, and it has been approved by the United States Supreme Court. The application of its principles is peculiarly within the purview of the judiciary. The right to decline its facilities where to provide them will work unnecessary burden upon litigants and taxpayers has been recognized in every Court, we believe, to which [fol. 70] the question has been presented, with the exception of Minnesota. It is a fundamental right. It is not predicated upon statute, nor can it be withdrawn by any legislative action. The refusal by the Courts of Missouri to recognize within themselves this fundamental power, which is necessary in extreme instances to preserve justice and protect the Courts, litigants, and taxpayers from abuse, would be a gratuitous abdication of right and responsibility.

To refuse, without express instruction from the Legislature, to exercise this fundamental power is to relegate the judiciary to a position subservient and secondary to the Legislature, and voluntarily to delimit the power of Missouri Courts to something less than that of the New York, Illinois, and other state Courts which have accepted this responsibility.

For these reasons relator submits that this Court ought to order respondent to rule upon the merits of relator's motion to dismiss.

Respectfully submitted, John H. Lathrop, Sam D. Parker, Donald H. Sharp, 1200 Land Bank Building, Kansas City 6, Missouri, Tel. VI-0820; Walter R. Mayne, Fred W. Schwarz, 506 Olive Street, St. Louis 1, Missouri, Tel. GA-2660, Attorneys for Relator.

[fol. 71] EXHIBIT A

STATE OF MISSOURI,
City of St. Louis, ss.:

IN THE CIRCUIT COURT, CITY OF ST. LOUIS, STATE OF MISSOURI

No. 26165-D, Div. 1

FLOYD P. SEACHRIS, *Plaintiff*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, 812 Olive Street, St. Louis 1, Missouri, Defendant

Petition

Plaintiff, for his cause of action against the above named defendant, states and alleges:

I

That at all times herein mentioned, defendant is and was a corporation duly organized and existing under and by virtue of law and as such, at all times herein mentioned, was engaged in the business of operating, owning and con-

trolling in interstate commerce, a railroad running into and through the State of Oklahoma and Waynoka, Oklahoma, and various other States of the Union and at all times herein mentioned, was engaged in conducting its business in the City of St. Louis, State of Missouri, and maintained offices and an agent for service of process in said City of St. Louis, Missouri.

[fol. 72]

II

That during all the times herein mentioned, defendant owned and operated in interstate commerce, a railroad and railroad yards in the City of Waynoka, Oklahoma, and plaintiff was in its employ as a switchman, the plaintiff and defendant being engaged in handling and moving interstate commerce and that said plaintiff was an employee within the intent and meaning of the Act of Congress of April 22nd, 1903, c. 149, Sec. 1, 35 Stat. 65, 45 U. S. C. A., Sec. 51 and amendments thereto of the Federal Employers' Liability Act, title "Liability for Common Carriers by Railroad, in Interstate and Foreign Commerce, for injuries to Employees from Negligence," and the Federal Safety Appliance Act of the United States.

III

That on the 26th day of February, 1948, plaintiff was working in defendant's yards, switching cars in and upon the tracks there and while engaged in his duties for defendant, in the furtherance of defendant's interstate commerce as aforesaid and while he was so at work and while plaintiff was riding a car in and upon a track there and was attempting to set the brake on said car, said car upon which plaintiff was riding, was caused to collide violently with another car on said track there, whereby plaintiff was caused to be hurled and thrown from said car upon which he was riding, to the ground and track there, causing plaintiff to be seriously and permanently injured, as hereinafter alleged.

IV

That the occurrence above referred to and resulting injuries to plaintiff, were directly and proximately caused by the negligence, carelessness and omissions and the wrongful violation by the defendant of the Federal Em-

[fol. 73] ployers' Liability Act of the United States and the Federal Safety Appliance Act of the United States and the failure of the defendant and its agents, to comply with the rules, customs and practices prevailing on said road, at said place and at said time, as follows, to-wit:

A. That the defendant's agents, servants and employees, in charge of said train and cut of cars, did then and there kick the car upon which plaintiff was riding, into and upon said track there, at a high, excessive and dangerous rate of speed under the circumstances.

B. That defendant, in violation of the Federal Safety Appliance Act of the United States, used and hauled on its line and system of railroad, a certain car which did not have an efficient handbrake, as required by said Act.

C. That the defendant negligently failed and omitted to provide and maintain for the plaintiff, a reasonably safe place to work.

V

That directly and proximately in consequence of the aforesaid negligent and careless actions of the defendant and defendant's violation of the said Federal Employers' Liability Act and the Federal Safety Appliance Act of the United States, plaintiff sustained serious injuries; that divers bones of his body were broken, injured and fractured; that his head, body, neck, chest, ribs, back, spine, spinal column and intervertebral spaces, between the intervertebral bodies of the spine and the various bones, muscles, nerves, tendons, ligaments and joints, were broken, ruptured, crushed, fractured, lessened, impaired, deranged, displaced, torn, injured and damaged and that the function, use and movement of all the parts and organs thereof, have been permanently impaired, limited and destroyed; that his nerves and nervous system have been greatly shocked and damaged; that because of said injuries, he [fol. 74] has become lame, crippled and unable to properly get about and his means of locomotion and bodily movements are affected and curtailed; that as a direct result of said injuries said plaintiff has been caused to suffer great pain of body and anguish of mind and all of these conditions and consequences are permanent and progressive.

VI

That prior to these injuries plaintiff was a strong, able-bodied man, capable of earning and actually earning a substantially large amount of money each year and that since suffering said injuries plaintiff has been totally disabled and hereafter will be so disabled and that he has lost his earnings and wages to date and will continue to lose them in the future; that by reason of said injuries, he has been made incapable of any gainful activities and in the future will be unable to earn his livelihood; that he has required hospitalization, nursing and medical care as a result of said injuries and he will require the same in the future.

VII

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Thousand Dollars ($100,000.00), together with his costs.

Cox & Cox, W. F. Smith, 706 Chestnut Street, St. Louis 1, Missouri, Chestnut 5492, Attorneys for Plaintiff.

[fol. 75] Circuit Court for the City of St. Louis, State of Missouri

No. 26165-D, Div. 1

Floyd P. Seachris, *Plaintiff*

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corp., Defendant

Summons

The State of Missouri, to Defendant Atchison, Topeka and Santa Fe Railway Company, a Corporation:

You are hereby summoned to appear before the above-named court and to file your pleading to the petition, copy of which is attached hereto, and to serve a copy of your pleading upon Cox & Cox and W. F. Smith, attorneys for plaintiff, whose address is 706 Chestnut Street, all within 30 days after service of this summons upon you, exclusive

of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition.

Henry L. Berger, Circuit Clerk; by —— ——, Deputy Clerk. (Seal of Circuit Court.)

Dated February 15th, 1949.

[fol. 76] EXHIBIT B

STATE OF MISSOURI,
City of St. Louis, ss.:

IN THE CIRCUIT COURT, CITY OF ST. LOUIS, STATE OF MISSOURI

No. 26165 D. Div. No. 1

FLOYD P. SEACHRIS, *Plaintiff*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Defendant

Motion to Dismiss

Now on this day comes The Atchison, Topeka and Santa Fe Railway Company, defendant in the above entitled cause, and moves the Court to dismiss this cause without prejudice, for the reason that it is brought by a non-resident plaintiff against a non-resident defendant, based on a cause of action arising outside the State of Missouri, and for the further reason that the bringing of said cause in this Court unduly burdens and inconveniences the defendant and the witnesses, and unnecessarily burdens the Court, and burdens the citizens and taxpayers of the City of St. Louis by congesting the docket of this Court and increasing the expense of the maintenance and operation thereof, all as more fully hereinafter set forth. Defendant further states:

1. That this is an action brought by plaintiff under the Federal Employers' Liability Act to recover the sum of $100,000 damages for personal injuries alleged to have been sustained at Waynoka, Oklahoma, on February 26, 1948.

[fol. 77] 2. That plaintiff is now and was at all times mentioned in the petition a resident of the State of Oklahoma and the City of Waynoka.

3. That defendant The Atchison, Topeka and Santa Fe Railway Company is a Kansas corporation having its principal office and place of business at Topeka, Kansas; that it operates 201 miles of main line track in the State of Missouri; and that the closest point that said line of railroad approaches the City of St. Louis is approximately 150 miles distant therefrom; that defendant is duly licensed to do business in the State of Missouri and maintains a ticket office in the City of St. Louis, upon which service of process may be had, but that said office is maintained merely for the solicitation of business.

4. That plaintiff on September 2, 1948, filed a suit against this defendant numbered 21990 D seeking to recover the same amount of damages for the same injury alleged to have been sustained in Waynoka, Oklahoma, on February 26, 1948, and that the petition in said cause is identical to the one filed herein.

That the trial of said case No. 21990 D was commenced in Division No. 5 of this Court before Judge Mayfield on February 7, 1949, and concluded two days later, during the introduction of evidence by defendant, on February 9, by a voluntary dismissal by plaintiff without prejudice.

5. That none of the parties or witnesses resided nor now reside in the City of St. Louis; that plaintiff in said cause No. 21990 D introduced the testimony of one witness from Waynoka, Oklahoma, and introduced the testimony of physicians whose residences and offices are in St. Louis, but that said physicians examined plaintiff merely for the purpose of testifying in said cause and not for the purpose of treating him and did not treat him.

[fol. 78] 6. That at the trial of said cause No. 21990 D, defendant was compelled to and did transport from Waynoka, Oklahoma, to St. Louis, a distance of 647 miles, eight witnesses at a total cost to defendant for expenses and time lost of $909.93; one witness from Amarillo, Texas, a distance of 853 miles, at a total cost of $134.63; one witness from Wellington, Kansas, a distance of 540 miles, at a total cost of $177.45; and one witness from Temple, Texas, a distance of 996 miles, at a total cost of $158.54.

That the total expense to defendant of the trial of the above case was, therefore, $1,380.55, and in addition thereto defendant suffered the inconvenience of loss of time of eleven of its employees for a period varying from two days to one week, resulting in a total number of days lost for its employees of 65 days.

That if defendant is compelled to again try this case in the City of St. Louis, it will have to reincur all of the above expense and inconvenience and that same will be increased because a longer time will be required to retry the cause since the first trial was not completed.

7. That plaintiff in both cases was and is represented by W. F. Smith, who is an attorney and resident of Oklahoma City, Oklahoma, and by the firm of Cox & Cox of St. Louis.

8. That this defendant operates over 600 miles of main line track throughout Oklahoma and that there are adequate courts, both State and Federal, in the State of Oklahoma, in which this cause can be brought and service obtained on defendant, and that there is ample time within the statute of limitations for plaintiff to refile after this motion is sustained.

9. That the trial of this case in St. Louis resulted in no benefit to the City of St. Louis or any resident or taxpayer thereof, but on the contrary was detrimental to them. [fol. 79] That the trial of this case and the trial of others of a similar nature brought in the City of St. Louis by nonresidents based on causes of action arising outside the City of St. Louis and outside the State of Missouri create a crowded condition of the docket and result in inconvenience to the City and to the residents and citizens thereof, and in increased expense to the City.

That only a part of the actual cost of the litigation is charged as costs in the case, and that the City is required to and does bear a large portion of the expense of said litigation.

10. That on February 7, the day on which said Seachris case numbered 21990 D was set and assigned for trial, there were 161 cases on the trial docket; that said Seachris case was No. 20 thereon; that it was the seventh case assigned for trial and that its assignment filled the last available division on the morning of February 7; that the third case so assigned for trial on said day was No. 23352,

Viola Siegel vs. Missouri Pacific R. R. Co.; that plaintiff in said cause was a resident of Jefferson City, Missouri; and that the cause of action arose over 100 miles from the City of St. Louis and that said Missouri Pacific could have been served at the place of plaintiff's residence.

That on said February 7 there were only four other cases assigned out for trial, and during the balance of the week only seven were so assigned, one of which was No. 19048, Willis Sturgeon vs. the L. & N. R. R. Co., in which case plaintiff resided and the cause of action arose in the State of Kentucky.

That out of the total of 161 cases on said trial docket for the week of February 7, only 18 were assigned for trial (three of which were suits against railroads by non-residents of St. Louis and two of which were brought by non residents of Missouri); and that after said Seachris case was assigned for trial, 56 cases subsequent to it on said trial [fol. 80] docket were continued to be reset for trial in the future.

11. That the following table shows the total number of suits filed against railroads in this Court during the years of 1945 to 1948, inclusive, the number brought by plaintiffs who did not reside in St. Louis, Missouri, and in which the cause of action did not arise in St. Louis, and the number of suits brought against railroads which did not run into St. Louis:

Year	Total No. of Cases	Cause of action did not arise or plaintiff did not reside in St. Louis	Against railroads not running into St. Louis
1945	48	30	2
1946	87	60	None
1947	113	76	5
1948	171	134	15

The following table shows the number of suits brought against The Atchison, Topeka and Santa Fe Railway Company in this Court during the years 1945 to April 1, 1949, inclusive:

1945	None
1946	None
1947	6
1948	12
1949 (first 3 months)	9

12. Plaintiff requests the opportunity to introduce oral evidence in support of the allegations of this motion.

Wherefore, in the interests of justice and for the convenience of the parties and witnesses and of this Court and to prevent undue expense to the citizens and taxpayers of the City of St. Louis and burdening of this Court with litigation by a non-resident plaintiff against a non-resident defendant on a cause of action arising outside the State [fol. 81] of Missouri, defendant prays that this cause be dismissed without prejudice.

John H. Lathrop, Sam D. Parker, 1200 Land Bank Building, Kansas City 6, Missouri, Tel. VI 0820; Walter R. Mayne, F. W. Schwarz, 506 Olive Street, St. Louis 1, Missouri, Tel. GA 2660, Attorneys for Defendant.

Service of the above Motion is hereby acknowledge this — day of April, 1949.

——— ———, ——— ———, Attorneys for Plaintiff.

State of Missouri,
County of Jackson, ss:

Sam D. Parker, of lawful age, being first duly sworn, on his oath states that he is agent and one of the attorneys for defendant; that he has read the foregoing motion, knows the contents thereof, and that the matters of fact therein alleged are true.

Sam D. Parker.

Subscribed and sworn to before me this 12th day of April, 1949. Kittie Kilburn, Notary Public Within and for Said County and State. My Commission Expires June 23, 1951.

[fol. 82] EXHIBIT C

IN THE CIRCUIT COURT CITY OF ST. LOUIS

No. 26165 D

FLOYD P. SEACHRIS

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

Room 1. May 4, 1949

MEMORANDUM FOR CLERK

Defendant's motion to dismiss on the ground of forum non conveniens denied upon the sole ground that in the opinion of the Court the Court has no jurisdiction or discretion to entertain or grant such a motion.

William L. Mason, Judge.

[fol. 83] IN SUPREME COURT OF MISSOURI

[Title omitted]

41558

ORDER—June 13, 1949

Now at this day, on consideration of the petition for a writ of mandamus herein the court doth order that an alternative writ of mandamus issue herein, as prayed, directed to the said respondent, said writ to be returnable to the court en banc in thirty days.

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

No. 41558

ALTERNATIVE WRIT OF MANDAMUS

THE STATE OF MISSOURI:

To David J. Murphy, Judge of the Circuit Court of the City of St. Louis, Missouri, and His Successors, as Presiding Judge of said Court, Greeting:

Whereas, it has been represented to the Supreme Court of the State of Missouri, on the part of The Atchison, Topeka & Santa Fe Railway Company, a corporation, relator, as indicated and set forth in a certain petition for a writ of mandamus, a copy of which is hereto attached and made a part hereof:

Now, Therefore, we being willing that due and speedy justice be done the said petitioner, in this behalf, Command you, the said David J. Murphy, Judge of the Circuit Court of the City of St. Louis, and his successors, as Presiding Judge of said Court, to set aside the order of May 4, 1949 entered in a cause entitled Floyd P. Seachris, plaintiff [fol. 84] versus The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant, No. 26165-D and to exercise your proper jurisdiction and to determine on the merits the issues presented by relator's motion to dismiss heretofore filed in said cause, or that you show cause, if any you have, before the Supreme Court, en banc, on the 13th day of July 1949 why you should not do so.

Herein fail not at your peril.

(Seal.) In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Jefferson this 16th day of June 1949. Marion Spicer, Clerk, Supreme Court.

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

No. 41558

RETURN TO ALTERNATIVE WRIT OF MANDAMUS—Filed July 12, 1949

Comes now David J. Murphy, Judge of the Circuit Court of the City of St. Louis, Missouri, respondent above named, and, for his return to the alternative writ of mandamus issued herein:

(1) Admits the allegations of paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9 of relator's petition for writ of mandamus herein.

(2) Admits the allegations of paragraph numbered 10 of relator's petition for writ of mandamus to the effect that respondent's predecessor, by his order of May 4, 1949, refused to rule upon the merits of relator's motion to dismiss, duly filed in said cause No. 26165-D in the Circuit Court of the City of St. Louis, Missouri; and denies each and every other allegation of said paragraph of said petition.

(3) Admits the allegations of paragraph numbered 11 of [fol. 84a] relator's petition for writ of mandamus to the effect that there are now pending in said Circuit Court numerous actions involving similar circumstances and that others are continually being filed, but denies each and every other allegation of said paragraph of said petition.

(4) Denies the allegations of paragraph numbered 12 of relator's petition for writ of mandamus herein.

For further return to the alternative writ of mandamus, this respondent states and avers that:

I. Relator, Atchison, Topeka & Santa Fe Railway Co., is a corporation engaged and engaging in the business of owning and operating a line and system of railroad as a common carrier, transporting freight and passengers for hire, in interstate and intrastate commerce, and operates its said business, and owns and operates a line of railroad in such commerce, in various parts of the State of Missouri.

II. Relator, Atchison, Topeka & Santa Fe Railway Co., maintains and operates in the City of St. Louis, Missouri,

offices for the transaction of its business, designated as "freight department offices", and "passenger department offices".

III. On or about the 15th day of February, 1949, there was filed in the Circuit Court of the City of St. Louis, Missouri, a petition in an action in which Floyd P. Seachris was designated as the plaintiff, and in which relator here, Atchison, Topeka & Santa Fe Railway Co., was designated as defendant, wherein the plaintiff sought damages against defendant in the sum of $100,000.00. In said petition, it was averred that the action was brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51 et seq.) to recover damages which allegedly resulted to plaintiff from negligence of the defendant (relator here), and defendant's violation of the Federal Safety Appliance Act, in a switching movement in a railroad yard of the defendant located in the City of Waynoka, State of Oklahoma, while plaintiff [fol. 85] was engaged in interstate commerce and transportation in the course and scope of his employment by defendant as a switchman. Said petition, and the action founded thereon, were and are numbered in said Circuit Court of the City of St. Louis, Missouri, as No. 26165-D. A copy of said petition in said cause No. 26165-D is attached to relator's petition herein as Exhibit A thereto, and is here incorporated by reference.

IV. Summons was duly issued for defendant (relator here) in said cause in said Circuit Court of the City of St. Louis, Missouri, and was on February 17, 1949, duly served upon the defendant in said cause.

V. On April 25, 1949, after having secured extensions of time within which to plead, defendant in said cause in said Circuit Court (relator here) duly filed in said cause its motion to dismiss said cause entitled "motion to dismiss", a copy of which motion is attached to relator's petition herein as Exhibit B thereto, and is here incorporated by reference. Said motion sought to have said action in said Circuit Court of the City of St. Louis, Missouri, dismissed under the doctrine of "forum non conveniens", it being averred therein substantially that: (1) Plaintiff in said action, at the time the cause of action therein accrued, and now, resides in the City of Waynoka, State of Oklahoma; (2) the defendant in said cause (relator here) is a Kansas

corporation having its principal office and place of business at Topeka, Kansas, operating 201 miles of main line track in the State of Missouri, with the closest point on said line being approximately 150 miles distant from the City of St. Louis, Missouri, where defendant maintains a ticket office upon which service of process may be had, and said office is maintained merely for the solicitation of business; (3) plaintiff had filed a prior action in the said Circuit Court, upon the same cause of action, which prior action had, after two days of trial, been voluntarily dismissed by plaintiff, without prejudice; (4) none of the parties or witnesses resided, or now reside, in the City of St. Louis, [fol. 86] although the plaintiff, in the trial of plaintiff's prior action based upon this same cause of action, introduced the testimony of one witness from Waynoka, Oklahoma, and the testimony of physicians, whose residences and offices are in St. Louis, but who examined plaintiff merely for the purpose of testifying as experts in said cause, and not for the purpose of treating him; (4) at the trial of the prior action filed by plaintiff upon the same cause of action, defendant was compelled to and did transport from Waynoka, Oklahoma to St. Louis, Missouri, a distance of 647 miles, 8 witnesses, together with 2 witnesses from the State of Texas and 1 from the State of Kansas, at a total expense of $1,380.55, and, in addition, defendant suffered the inconvenience of loss of time of 11 of its employees for a total of 63 man days; (5) if defendant is compelled to again try another action upon plaintiff's cause of action in the City of St. Louis, it will have to reincur the same expense and inconvenience, and probable additional expense and inconvenience because a longer time will be required to retry the entire case; (6) the plaintiff Stachris, in both of his actions, was and is represented by W. F. Smith, an attorney of Oklahoma City, Oklahoma, and by the firm of Cox & Cox, attorneys of St. Louis; (7) The defendant (relator here) operates over 600 miles of main line tracks throughout Oklahoma, and there are adequate state and Federal courts in the State of Oklahoma in which plaintiff's cause can be brought and service obtained on defendant, and there is ample time within the statute of limitations for plaintiff to refile his suit in Oklahoma; and (8) the trial of plaintiff's prior action in St. Louis resulted in no benefit to the City of St. Louis, or any resident or taxpayer thereof, but on the contrary was detrimental to them, and the trial

of plaintiff's said case and other cases of a similar nature brought in the City of St. Louis by non-residents based on [fol. 87] causes of action arising outside of the City of St. Louis, State of Missouri, create a crowded condition of the docket and result in inconvenience to said City and to the residents and citizens thereof, and in increased expense to said City. Said motion further set out certain statistical data in connection with the condition of the docket of the Circuit Court of the City of St. Louis, Missouri.

VI. On the 4th day of May, 1949, said motion was presented and submitted in Division No. 1 of the said Circuit Court, and to William L. Mason, Judge thereof.

VII. On the said 4th day of May, 1949, said William L. Mason, as Judge of said Division No. 1 of said Circuit Court of the City of St. Louis, Missouri, entered an order in said cause in said Court, ruling on said motion to dismiss, in words and figures as follows, to-wit:

> "Defendant's motion to dismiss upon the ground of forum non conveniens denied upon the sole ground that in the opinion of the Court the Court has no jurisdiction or discretion to entertain or grant such a motion."

A copy of said order being attached to relator's petition herein as Exhibit C thereto and which is here incorporated by reference.

VIII. Said Circuit Court of the City of St. Louis, Missouri, is a court of general jurisdiction, has had at all times since February 15, 1949, full and complete jurisdiction of the subject matter of said cause No. 26165-D therein, and has had at all times since March 19, 1949, and now has, full and complete jurisdiction of and over the parties to said cause.

IX. The existence of jurisdiction in said Circuit Court of the City of St. Louis, Missouri, of and over both the subject matter of and the parties to said cause of action numbered 26165-D creates an implication of a duty to exercise such jurisdiction, and that the exercise of such jurisdiction may be onerous does not militate against that implication.

[fols: 88-89] X. Under the applicable statutes, under the controlling decisions of the Supreme Court of the State of

Missouri and the Supreme Court of the United States of America, and under the applicable provisions of the Constitution of the State of Missouri (particularly Sections 10 and 14 of Article I thereof) and of the Constitution of the United States of America (particularly Amendment V and Section 1 of Amendment XIV thereof), the said Circuit Court of the City of St. Louis, Missouri, this respondent as one of the Judges thereof, and his predecessor, were and are without jurisdiction or discretion to entertain the said motion to dismiss filed by defendant in said cause No. 26165-D in said Circuit Court (relator here), and for said Circuit Court, or any of the judges thereof (including this respondent and his predecessor) to attempt to exercise discretion to entertain said motion would deprive the plaintiff in said cause No. 26165-D of his rights without due process of law, would deny him equal protection of the laws, and would deny him the right of having the courts open to him to afford him certain remedy for his injury, contrary to the aforesaid provisions of the State and Federal Constitutions.

Wherefore, having fully made return to the alternative writ of mandamus herein, respondent prays that said alternative writ of mandamus be quashed.

Roberts P. Elam, 892 Arcade Building, St. Louis 1, Missouri, Harvey B. Cox, 706 Chestnut Street, St. Louis 1, Missouri, Attorneys for David J. Murphy, Judge of the Circuit Court of the City of St. Louis, Missouri, and his Successors, as Presiding Judge of said Court, Respondent.

Cox & Cox, 706 Chestnut Street, St. Louis 1, Missouri, of Counsel.

Due service of the above return is hereby acknowledged this 11 day of July, 1949.

F. W. Schwarz, Attorney for Relator.

[fol. 90] IN THE SUPREME COURT OF MISSOURI

Court En Banc

[Title omitted]

No. 41461, No. 41558

MOTION OF RELATORS TO CONSOLIDATE ORAL ARGUMENT AND TO EXTEND TIME FOR ARGUMENT—Filed August 10, 1949

Comes now relators in the above captioned cases and state to the court that the principles of law and the appellate issues therein are identical and that their presentation to the court can be expediently and adequately covered by a single argument.

Relators further state that in order to intelligently discuss and portray the issues herein to the court would in all probability require more than the allotted time of forty minutes [fol. 91] and relators therefore suggest the granting of additional time. The question of consolidation and additional time have been taken up with respondents' attorney and he has no objection thereto.

Wherefore, relators move the court for an order consolidating the oral argument of these cases and that such single argument be made on the call of the State ex rel. Southern Railway case on September 14, 1949, and for a further order extending the time for oral argument on the part of relators to one hour and a quarter with equal comparative extension to respondents if desired.

(Signed) Kramer, Campbell, Costello & Wiechert, Fordyce, White, Mayne, Williams & Hartmand, F. W. Schwarz, Attorneys for relator Southern Railway Company. Sam D. Parker, Fordyce, White, Mayne, Williams & Hartman, F. W. Schwarz, Attorneys for relator The Atchison, Topeka & Santa Fe Railway Company.

Service of a copy hereof acknowledged this 9th day of August, 1949.

(Signed) Roberts P. Elam, Attorneys for respondents, by William O. Cramer.

[fol. 92] IN SUPREME COURT OF MISSOURI

ORDER CONSOLIDATING CAUSES—August 12, 1949

[Title omitted]

Now at this day the court having seen and considered relators' motion to consolidate and to extend the time for oral argument, doth order that said motion be, and the same is hereby sustained as to consolidation and causes ordered consolidated, as prayed; and overruled as to the extension of time for oral argument; and the causes are set for argument for Wednesday, September 14, 1949.

IN SUPREME COURT OF MISSOURI

[Title omitted]

SUBMISSION—September 12, 1949

Come now the parties, by their respective attorneys, and submit the above entitled causes to the court on briefs.

[fol. 93] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

En Banc

September Session, 1949

No. 41,461 *

STATE OF MISSOURI, at the Relation of SOUTHERN RAILWAY COMPANY, a Corporation, Relator,

vs.

WALDO C. MANFIELD, Judge of the Circuit Court of the City of St. Louis, Missouri and His Successors as Presiding Judge of Said Court, Respondent

No. 41,558 *

STATE OF MISSOURI ex rel. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Relator,

vs.

The Honorable DAVID J. MURPHY, Judge of the Circuit Court of the City of St. Louis, Missouri, and His Successors, as Presiding Judge of Said Court, Respondent

OPINION—Filed October 10, 1949

These two cases involve identical issues and for that reason they were consolidated for argument before this court. They are original proceedings in mandamus to compel the trial court to use discretion in passing on relators' motions to dismiss these actions brought under the Federal Employers' Liability Act. The trial court (William L. Mason, deceased) denied the motions on the sole ground that in his opinion the court had no jurisdiction or discretion to entertain or grant them.

Relator Southern Railway Company was sued by Lelia M. Blevins, Administratrix, in the circuit court of the city of St. Louis for $100,000 for the death of her husband, based on the Federal Employers' Liability Act. This relator filed a motion to dismiss this action on the ground of inap-

[fol. 94] propriate forum within the doctrine of *forum non*

conveniens. This motion alleged that the plaintiff was a resident of Tennessee and was appointed administratrix of the estate of her husband by a Tennessee probate court, and that her husband was also a resident of that state at the time of his death. The motion further stated that this relator was a Virginia corporation and that the alleged acts of negligence took place near the boundary line between the states of Virginia and Tennessee, some 700 miles from St. Louis. It further emphasized the added expense of trying the case in St. Louis rather than at or near the place the alleged cause of action arose and where the parties and witnesses resided.

Floyd P. Seachris filed suit in the circuit court of St. Louis against the relator, the Atchison, Topeka and Santa Fe Railroad Company, under the Federal Employers' Liability Act, for alleged injuries he received at Waynoka, Oklahoma. This relator also filed a motion to dismiss that action under the doctrine of *forum non conveniens.* The facts alleged in this motion are similar to the facts alleged by the relator, the Southern Railway Corporation, except in this instance it is alleged that Waynoka is 647 miles from St. Louis.

As previously stated, the trial court denied these motions. The ground for the denial of each of these motions was that the "Court has no jurisdiction or discretion to entertain or grant such a motion."

The sole question before us is: May a trial judge of a circuit court of this state exercise his judicial discretion in determining whether to retain or relinquish jurisdiction of a case brought under the Federal Employers' Liability Act when a motion to dismiss on the sole ground of *forum non conveniens* is presented before him for a ruling?

In the case of Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 91 L. Ed. 1055, 67 S. Ct. 839, l.c. 841-842, the Supreme Court of the United States said:

"It is true that in cases under the Federal Employers' Liability Act, 45 U. S. C. A. § 51 et seq., we have held that [fol. 95] plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens.* But this was because the special venue act under which those cases are brought was believed to require it. Baltimore & Ohio R. Co. v. Kepner, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28, 136 A. L. R. 1222; Miles v. Illinois Central R. Co., 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129, 146 A. L. R. 1104. Those decisions

do not purport to modify the doctrine as to other cases governed by the general venue statutes''

That court upheld the Federal District Court of New York when it dismissed the plaintiff's suit on the ground that the doctrine of *forum non conveniens* applied. But that action was brought under the general venue statute. It was not a Federal Employers' Liability case.

In the case of Ex-Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 93 L. Ed. (Adv. Sheets) 901, l.c. 903 and 904-905, the Supreme Court of the United States said:

''Prior to the current revision of title 28 of the United States Code, *forum non conveniens* was not available in Federal Employers' Liability Act suits. Baltimore & O. R. Co. v. Kepner, 314 U. S. 44, 86 L. ed. 28, 62 S. Ct. 6, 130 ALR 1222 (1941); Miles v. Illinois C. R. Co., 315 U. S. 698, 86 L. ed. 1129, 62 S. Ct. 827, 146 ALR 1104 (1942); see Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 505, 91 L. ed. 1055, 1060, 67 S. Ct. 839 (1947). The new Code, however, provides that 'For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' This is § 1404 (a).''

''Section 6 of the Liability Act defines the proper forum; § 1404 (a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404 (a) does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously.

''The Code, therefore, does not repeal § 6 of the Federal Employers' Liability Act.''

[fol. 96] Section 1404 (a), supra, became effective September 1, 1948, and applies only to civil suits brought in the federal courts. It has no application to Federal Employers' Liability suits brought in state courts. We have no machinery to transfer these two cases, one to the state or federal courts of Tennessee and the other to the courts of Oklahoma. Relators do not contend that this section applies to the problem before us. They do not ask that the two suits in question be transferred but they rely upon the common law doctrine of *forum non conveniens* which calls for a dismissal of the action.

"While the substantial factors to be weighed in determining a motion under Section 1404 (a) may be similar to those involved in a consideration of forum non conveniens, yet it seems clear that transfer under Section 1404 (a) is something more than and somewhat different from dismissal under forum non conveniens. In the first place, the procedure to be followed in affirmatively invoking the two remedies is drastically different. Under Section 1404 (a) a case is not dismissed but merely transferred to the more convenient forum; under forum non conveniens a case is dismissed and must be instituted anew in the more convenient forum, carrying with it the inherent and jeopardous hazard of being barred therein by the statute of limitations. The danger of having the action barred in such a manner was one of the principal reasons for Mr. Justice Black's dissent in Gulf Oil Corp. v. Gilbert, 1947, 330 U. S. 501, 516 [15 LW 4315].

"The doctrine of forum non conveniens has been held inapplicable to cases instituted under 'special venue' statutes, such as actions arising under the Federal Employers' Liability Act and the antitrust laws. Such types of cases may be transferred under Section 1404 (a), however. Ex parte Collett, 1949 * * * 17 U. S. L. W. 4453; United States v. National City Lines, 1949, * * * 17 U. S. L. W. 4459. In this respect, then, the two remedies are also different." U. S. D. C., Del. (Rodney, J.); Cinema Amusements, Inc. v. Loew's, Inc., June 10, 1949, 18 U. S. L. W. 2021.

Thus, with reference to Federal Employers' Liability [fol. 97] actions brought in state courts the law is the same now as it was before Section 1404 (a) was enacted.

The case of Baltimore and Ohio R. Co. v. Kepner, 314 U. S. 44, 86 L. Ed. 28, 62 S. Ct. 6, l.c. 9-10, was a suit brought in a state court of Ohio against an injured resident employe of the Baltimore and Ohio Railroad to enjoin him from prosecuting a suit he instituted in the United States District Court of New York under the Federal Employers' Liability Act for an injury he received in the State of Ohio. The Supreme Court of Ohio denied the injunction. Upon application of the railroad, the Supreme Court of the United States issued its writ of certiorari to review the Ohio decision. In affirming the decision of the Supreme Court of Ohio, that court said:

"The real contention of petitioner is that despite the admitted venue respondent is acting in a vexatious and in-

equitable manner in maintaining the federal court suit in a distant jurisdiction when a convenient and suitable forum is at respondent's doorstep.

"We read the opinion of the Supreme Court of Ohio to express the view that if it were not for Section 6 of the Employers' Liability Act the requested injunction would be granted on the undisputed facts of the petition. Section 6 establishes venue for an action in the federal courts. As such venue is a privilege created by federal statute and claimed by respondent the Supreme Court of Ohio felt constrained by the Supremacy Clause to treat Section 6 as decisive of the issue. It is clear that the allowance or denial of this federal privilege is a matter of federal law, not a matter of state law under Erie Railroad Co. v. Tompkins, 304 U. S. 64, 72, 58 S. Ct. 817, 819, 82 L. Ed. 1188, 114 A. L. R. 1487. Its correct decision depends upon a construction of a federal act. Consequently the action of a state court must be in accord with the federal statute and the federal rule as to its application rather than state statute, rule or policy.

"Petitioner presses upon us the argument that the action of Congress gave an injured railway employee the privilege of extended venue, subject to the usual powers of the state [fol. 98] to enjoin what in the judgment of the state courts would be considered an improper use of that privilege. This results, says petitioner, because the Act does not in terms exclude this state power. As courts of equity admittedly possessed this power before the enactment of Section 6, the argument continues, it is not to be lightly inferred that the venue privilege was in disregard of this policy. But the federal courts have felt they could not interfere with suits in far federal districts where the inequity alleged was based only on inconvenience. There is no occasion to distinguish between the power and the propriety of its exercise in this instance since the limits of the two are here co-extensive. The privilege was granted because the general venue provisions worked injustices to employees. It is obvious that no state statute could vary the venue and we think equally true that no state court may interfere with the privilege, for the benefit of the carrier or the national transportation system, on the ground of inequity based on cost, inconvenience or harassment. When the section was enacted it filled the entire field of venue in federal courts. A privilege of venue granted by the legislative body which

created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910, for the benefit of employees."

The case of Miles v. Illinois Central R. Co., 315 U. S. 698, 86 L. Ed. 1129, 62 S. Ct. 827, l.c. 830-831, was a suit to review the action of the Tennessee Court of Appeals which had enjoined the plaintiff, a resident of Tennessee, from prosecuting a suit under the Federal Employers' Liability Act in the circuit court of St. Louis, Missouri, for the death of her husband which occurred in Tennessee while working for the railroad. In ruling the case the court said:

"In the legislative history of section 6, the provision that removal may not be had from a 'State court of competent jurisdiction' was added to the House bill on the floor of the Senate and later accepted by the House, in order to assure [fol. 99] a hearing to the employee in a state court. Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. The venue of state court suits was left to the practice of the forum. The opportunity to present causes of action arising under the F. E. L. A. in the state courts came, however, not from the state law but from the federal. By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source. This is so because the Federal Constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose."

"Since the existence of the cause of action and the privilege of vindicating rights under the F. E. L. A. in state courts spring from federal law, the right to use in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right to sue in federal courts. It is no more subject to interference by state action than was the federal venue in the Kepner case."

"The permission granted by Congress to sue in state courts may be exercised only where the carrier is found doing business. If suits in federal district courts at those points do not unduly burden interstate commerce, suits in similarly located state courts cannot be burdensome. As

Congress has permitted both the state and federal suits, its determination that the carriers must bear the incidental burden is a determination that the state courts may not treat the normal expense and inconvenience of trial in permitted places, such as the one selected here, as inequitable and unconscionable."

Thus, it is clear that under the Kepner and Miles cases, supra, a state court cannot dismiss a Federal Employers' Liability case solely under the *forum non conveniens* doctrine.

"*The Federal Employers' Liability Act, as interpreted by Kepner, increases the number of places where the defendant may be sued and makes him accept the plaintiff's* [fol. 100] *choice.*" (Italics ours.) Gulf Oil Corporation v. Gilbert, supra, 67 S. Ct. 839, l.c. 842.

Relators rely mainly upon the case of Douglas v. New York, N. H. & H. R. Co., 279 U. S. 377, 73 L. Ed. 747, 49 S. Ct. 355. In that case a resident of Connecticut brought a suit in a state court of New York under the Federal Employers' Liability Act against the defendant, a Connecticut corporation, for personal injuries inflicted in Connecticut. The trial court dismissed the action under a statute which it held gave it discretion in suits brought by non-resident plaintiffs. The trial court action was affirmed by the New York Court of Appeals. This was the statute in question: "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: * * * 4. Where a foreign corporation is doing business within this State."

The Supreme Court of the United States held that this statute was not in violation of Article 4, Section 2, of the Constitution of the United States, as discriminating between citizens of New York and citizens of other states when construed as using the word "resident" in the strict primary sense of one actually living in the place for a time, irrespective of domicile. Such was the construction placed upon this statute by the New York Court of Appeals. It also held that state courts are not required to entertain suits under the Federal Employers' Liability Act but are empowered to do so.

We do not think this case sustains the relator. The common law doctrine of *forum non conveniens* is not even mentioned in the opinion. In the first place, Missouri does

not have a statute similar to the New York statute which the courts of that state have held to give them discretionary power to dismiss an action brought by a non-resident as distinguished from a citizen of another state. Also, Missouri permits citizens of this state to file Federal Employers' Liability cases in its courts. To deny the same privilege to citizens of another state would violate Article 4, Section 2, of the Constitution of the United States.

Relators also rely upon the case of Chambers v. Baltimore [fol. 101] & Ohio Railroad Co., 207 U. S. 142, 28 S. Ct. 34, l.c. 36, 52 L. Ed. 143. In that case the wife of an employe brought suit in a state court of Ohio for injuries received by her husband in Pennsylvania which caused his death. Both the husband and wife were residents of the latter state. The court held that an Ohio statute which permits suits in Ohio state courts for wrongful death occurring in another state only when the decedent was a citizen of Ohio did not violate the Privileges and Immunity Clause of the Federal Constitution (Article 4, Section 2). In ruling the case, that court said:

"The courts were open in such cases to plaintiffs who were citizens of other states if the deceased was a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another state. So far as the parties to the litigation are concerned, the state, by its laws, made no discrimination based on citizenship, and offered precisely the same privileges to citizens of other states which it allowed to its own. There is, therefore, at least a literal conformity with the requirements of the Constitution."

The opinion in the Chambers case deals only with the constitutionality of a state statute; it does not mention the Federal Employers' Liability Act nor the doctrine of *forum non conveniens*. This state does not have any such statute. We fail to see its applicability to the issue before us.

The Federal Employers' Liability Act does not compel the courts of this state to hear cases arising under that act, but it empowers our courts to do so.

Since Missouri does allow its citizens to maintain Federal Employers' Liability actions in its courts, (see the many such cases listed in the Missouri Digest) it follows that not to allow citizens of other states the right to file Federal Employers' Liability suits in our state courts would violate

Article 4, Section 2, of the Constitution of the United States.

The relators do not contend that the circuit court of St. Louis does not have jurisdiction of the parties or of the sub-
[fol. 102] ject matter of these two suits, or that there is any state statute that would prohibit maintaining these suits in our state courts, but their sole contention is that the common law doctrine of *forum non conveniens* should be open to them in these cases. Under the Kepner and Miles cases, supra, the doctrine of *forum non conveniens* is not open to relators in the two Federal Employers' Liability cases in question.

Respondents also contend that under our Constitution and statutes the doctrine of *forum non conveniens* cannot be recognized in Missouri. Since we have already ruled the trial court had no discretion in Federal Employers' Liability cases, it is not necessary to discuss the Missouri law upon that subject.

From what we have said, it follows that our writ should be quashed. It is so ordered.

Ernest M. Tipton, Judge.

All concur.

[fol. 103] IN SUPREME COURT OF MISSOURI

41558

Mandamus

STATE OF MISSOURI, at the Relation of The Atchison, Topeka & Santa Fe Railway Company, a Corporation, Relator,

vs.

DAVID J. MURPHY, Judge of the Circuit Court of the City of St. Louis, Missouri, and His Successors, as Presiding Judge of Said Court, Respondent

41461

Mandamus

STATE OF MISSOURI, at the Relation of Southern Railway Company, a Corporation,

vs.

WALDO C. MAYFIELD, Judge of the Circuit Court of the City of St. Louis, Missouri, and His Successors, as Presiding Judge of Said Court, Respondent

JUDGMENT—October 10, 1949

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the alternative writs heretofore issued herein, be, and the same are hereby quashed. (Opinion filed)

[fol. 104] IN THE SUPREME COURT OF MISSOURI

[Title omitted]

RELATORS' MOTION FOR REHEARING—Filed October 22, 1949

Come now relators herein and respectfully move the Court to set aside its opinion and judgment herein on October 10, 1949, and to grant relators a rehearing of this cause, and for grounds of this motion state that the Court has overlooked

and misinterpreted material matters of law, as shown by its opinion in the following respects.

I

When on pages 2 and 3 of its opinion it quoted from *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, 91 L. Ed. 1055, 67 S. Ct. 839, l. c. 841-842, language to the effect that plaintiff's choice of forum in cases under the Federal Employers' Liability Act cannot be defeated on the basis of forum non conveniens, presumably thereby to indicate that our state courts were bound to retain jurisdiction in Federal Employers' Liability Act cases. The Court in so doing [fol. 105] overlooked the fact that in the Gulf Oil case this language was being used in connection with cases instituted in the United States district courts and also that the venue provision in the Act is a special venue statute, binding on the federal courts but not binding on the state courts.

II

When on pages 3 and 4 of the opinion it quoted from *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944, 93 L. Ed. (Adv. Sheets) 901, l. c. 903, 904-905, it overlooked and misinterpreted that part of the Collett opinion which states that the doctrine of forum non conveniens is applicable to Federal Employers' Liability Act cases and overlooked the opinion of the United States Supreme Court in *United States v. National City Lines*, 334 U. S. 573, 92 L. Ed. 1584 (relators' reply brief, page 20).

III

On pages 5 and 6, it relies on the case of *Baltimore and Ohio R. Co. v. Kepner*, 314 U. S. 44, 86 L. Ed. 28, 62 S. Ct. 6, l. c. 9-10, as sustaining the asserted proposition that a state court must re-train jurisdiction of Federal Employers' Liability Act cases. In so relying on said case, the Court has overlooked the fact that this case had to do with the power of a state court to restrain one of its citizens from bringing a Federal Employers' Liability Act case in the federal court in another state. The case had nothing to do with, nor did it discuss, the proposition of compulsory retention of a Federal Employers' Liability Act case by a state court in which the action is brought. The basis of the case was that inasmuch as Section 6 of the Federal Em-

ployers' Liability Act encompassed special venue provisions, a state did not have the right to prevent one of its citizens from bringing suit in the first instance in any place coming within the provisions of such venue statute.

[fol. 106] IV

When on pages 6 and 7 of the opinion the Court relies on the case of *Miles v. Illinois Central R. Co.*, 315 U. S. 698, 86 L. Ed. 1129, 62 S. Ct. 827, l. c. 830-831, it misinterprets the Miles case in the same manner that it misinterprets the Kepner case, supra. The Miles case does not hold that the doctrine of forum non conveniens is inapplicable in Federal Employers' Liability Act cases but, on the contrary, held that a state court was not compelled by federal law to retain jurisdiction in such cases. The majority opinion in the Miles case is contrary to this Court's opinion and supports relators' position here.

V

On page 8 of the opinion this Court states that the case of *Douglas v. N. Y., N. H. & H. R. Co.*, 279 U. S. 377, 73 L. Ed. 747, 49 S. Ct. 355, does not sustain relators' position but in doing so, it misinterprets the facts and the holding of the United States Supreme Court. The United States Supreme Court in that case declared the law to be that neither the United States Constitution nor the Federal Employers' Liability Act deprived the State of New York of the right to apply the doctrine of forum non conveniens to a Federal Employers' Liability action brought in the state court.

So, on page 9 of its opinion, the Court overlooks and misinterprets the holding of the United States Supreme Court in the Douglas case when it states that not to allow citizens of other states to file Federal Employers' Liability Act suits in the Missouri courts would violate Article 4, Section 2 of the Federal Constitution. This issue was presented by the plaintiff in the Douglas case and the Supreme Court held that the rejection of a Federal Employers' Liability Act case by a state court did not violate these constitutional provisions.

[fol. 107] The Court also overlooked the case of *Herb* v. *Pitcairn*, 324 U. S. 117, 89 L. Ed. 789 (1945) (relator Southern Railway Company's brief, page 51) approving the opinion of *Douglas* v. *N. Y., N. H. & H. R. Co.*, supra.

No suggestions are filed by relators in support of this Motion for Rehearing for the reason that all matters covered herein were fully covered in relator Southern Railway Company's and relator Atchinson, Topeka and Santa Fe Railway Company's briefs and relators' joint reply brief, all of which have been overlooked by this Court. Any suggestions filed in support of this motion would, therefore, be mere reiteration.

Respectfully submitted, Kramer, Campbell, Costello & Wiechert, First National Bank Bldg., E. St. Louis, Ill. Fordyce, White, Mayne, Williams & Hartman, F. W. Schwarz, 506 Olive Street, St. Louis, Missouri, Attorneys for Relator, Southern Railway Company.

John H. Lathrop, Sam D. Parker, Donald H. Sharp, 1200 Land Bank Bldg., Kansas City, Mo., Walter R. Mayne F. W. Schwarz, 506 Olive Street, St. Louis, Missouri, Attorneys for Relator, The Atchison, Topeka and Santa Fe Railway Company.

[fol. 108] IN SUPREME COURT OF MISSOURI

ORDER DENYING REHEARING—November 14, 1949

Now at this day, the court having seen and fully considered relators' motion for a rehearing in the above entitled cause, doth order that said motion be, and the same is hereby overruled.

[fols. 109-110] [File Endorsement Omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

MOTION TO STAY MANDATE—Filed November 17, 1949

Come now Southern Railway Company and The Atchison, Topeka and Santa Fe Railway Company, Relators in the above consolidated causes, and move the Court to stay the mandate therein for ninety (90) days to give Relators time

to prepare a petition for certiorari in the Supreme Court of the United States.

Kramer, Campbell, Costello & Wiechert, F. W. Schwarz, Fordyce, White, Mayne, Williams & Hartman, Attorneys for Relator, Southern Railway Co.

John H. Lathrop, Sam D. Parker, Donald H. Sharp, Walter R. Mayne F. W. Schwarz, Attorneys for Relator, The Atchison, Topeka and Santa Fe Ry. Co.

[fol. 111] In Supreme Court of Missouri

Order Staying Mandate—November 17, 1949

Come now the relators, by attorney, and file and present to the court their motion to stay the mandate in the above consolidated cause, which motion is by the court examined and sustained and the mandate ordered stayed as prayed.

[fols. 112-113] Amended Praecipe Omitted

[fol. 114] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 115] Supreme Court of the United States, October Term, 1950

No. 15

Order Allowing Certiorari—Filed March 27, 1950

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 116] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 16

ORDER ALLOWING CERTIORARI—Filed March 27, 1950

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.